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n21 See id. at 242-45.

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The point of equality of opportunity, on this view, is to guarantee that people go as far as their abilities, talents, initiative, and dedication take them. (I will refer simply to "merit" to denote that complex of characteristics; later I will discuss the complexities of the notion of merit.) So understood, equality of opportunity appears to be a principle that justifies, and perhaps requires, inequality of results. There should be equality among those with the same level of merit, but there is no reason for equality among those with different levels of merit. Because abilities differ, as do the willingness and capacity to use them, results will differ. Equality of result seems antithetical to this conception of equality of opportunity because equality of result seems to call for levelling the differences in condition that are produced by different levels of merit. I will refer to this conception of "equality of opportunity, not equality of result" as the meritocratic conception; those with the most merit ought to do better.

B. The Justification for the Meritocratic Conception

Part of the intuitive appeal of this conception of "equality of opportunity, not equality of result" stems from the analogy that can be drawn to a game. n22 If a game is well designed and its rules are enforced, each of the competitors can be said to have an equal opportunity to win even though some will have more of the requisite abilities. To insist that the results be equalized to compensate [*182] for differences in ability among the competitors would be inconsistent with the whole idea of playing the game.

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n22 In the nontechnical sense of a game played for amusement, not in the more technical sense in which "game" is used in microeconomics to refer to certain kinds of interactions between people. See, e.g., DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELLING (1990). The analogy between "equality of opportunity" and a game is found in many places. See, e.g., RAE, supra note 9, at 65-66.

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As the analogy suggests, however, one must justify the game that is being played. In our society, people who succeed in the market-place, roughly speaking, are rewarded. But why should we play the market-oriented game to which we are accustomed instead of, for example, a game that rewards physical strength and courage, or hereditary ties to famous families? Those games would be lost by many people who win the market game and won by many people who do not succeed in the market.

Today the most common justification for the market game is consequentialist. On this view, "merit" is rewarded because it makes society better off. We reward people who produce things that other people value; people succeed according to their ability to satisfy others' desires. That is what "merit" is. There is no fixed catalogue of capacities that are rewarded, and no one is rewarded for the mere possession of an unexercised capacity. It all depends

on what will benefit society. The "barriers" that face the untalented simply reflect their lack of the capacities that bring value to others in society.

According to the meritocratic conception, then, equality of opportunity exists when everyone is allowed to compete equally to satisfy others' desires, as those desires are revealed in the market. When the government alters the results of that competition, it promotes equality of result, not equality of opportunity. n23 There is much to say, of course, about the justification for the market game. Most would agree today, I believe, that market mechanisms should play an important role in distributing wealth; but few would say that market distributions are inviolate. My purpose here, however, is to analyze the conception of equality of opportunity that corresponds to this game and to determine its relationship to the notion of equality of result. My argument is that the kind of equality involved in the market-oriented meritocratic regime of equality of opportunity is not meaningfully distinguishable from the kind of equality involved in government actions to "equalize results" by altering the distributions produced by the market.

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n23 For this conception, see Daniel Bell, On Meritocracy and Equality, 29 PUB. INTEREST 29, 40-41 (1972).

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[*183] C. The Nature of Meritocratic Equality

Leaving aside the distinction between opportunity and result, it is not clear why a market-oriented meritocracy should be characterized as one of equality at all -- in anything but a Pickwickian sense. In a game, everyone has an equal opportunity to succeed only if "equality" is defined by the rules of the game. An uncoordinated person obviously does not have the same opportunity to succeed in sports as a superbly coordinated person. Why should not the market-oriented meritocratic regime be characterized as one of inequality of opportunity? People with certain talents have a much better chance to succeed than others. The inequality of opportunity may be justified by the way the market operates to satisfy desires. But inequality of opportunity remains a more accurate description.

Suppose, for example, there were a society that valued not the satisfaction of desires as revealed in the market, but the production of human specimens of great physical beauty and strength; suppose that society showered riches on the few people who had such characteristics because it thought that doing so would propitiate the gods. We would not regard such a society as one characterized by equality of opportunity. If we did so regard it, then any society could be so regarded. But in what sense does that society have less equality of opportunity than a market-oriented meritocratic society? Anyone who became extremely strong or beautiful could succeed spectacularly; in that sense there would be equality of opportunity. Of course, characteristics beyond anyone's control would powerfully affect people's chances of success. But that is true of the meritocratic conception as well. And, as in the meritocratic society, people who valued beauty and strength could do something to improve their chances.

In this light, there is something puzzling about the association of market regimes with any kind of equality. Nonetheless, there is a persistent

intuition that a market-oriented meritocratic regime is characterized by equality of opportunity in a way that is not true of other regimes, such as the hypothetical one I just described or an aristocratic regime. Three related aspects of the market regime seem to account for this.

First, in the market regime many people have the impression that they have a significant degree of control over whether they [*184] succeed. Perhaps I will in the end be blocked by my lack of talents, but chances are my fate is in my hands; it depends on how hard I work and how enterprising I am. Obviously not everyone holds this view, and in significant ways it is an illusion. Nevertheless it is a commonly held view and it accounts, I think, for the perception that a market-oriented regime is one of equality of opportunity.

Second and related, in a market regime there may be a sense, within certain classes, that almost anyone can succeed. All a person has to do is to figure out a way to appeal to large numbers of people -- to build a better mousetrap -- and she will succeed. In an aristocratic regime, by contrast, it will be clearer for many more people at an early point in their lives that they are destined not to succeed because they were born into the wrong family.

Third, in a market-oriented regime the specific criteria of value are fluid. The path to success is not obvious and it can change overnight. In addition, no single person has the power to determine which capacities will be rewarded. Value is the result of a multitude of private decisions. All of these factors contribute to the sense that few people are permanently closed out. Moreover, failure will seem, even to the person who failed, to be the result of her own shortcomings rather than the fiat of another individual person. In a regime of equality of opportunity, the explanation for failure is: "I had a chance, but I wasn't good enough." In a regime with unequal opportunity, the complaint is: "I never had a fair chance; so-and-so [a person or group] closed the door on me."

Of course, each of these intuitions about a market regime is to a significant extent incorrect. People often do not have control in any meaningful sense (leaving aside controversial questions about what "control" might mean) over whether they succeed in the market. While we cannot identify winners and losers at birth, as we might in other regimes, we do know from the outset that many people will be losers. (In fact, we probably can identify more market losers at birth than the official rhetoric would acknowledge, but that is a different issue.) And the criteria of value are dictated by others; the only reason we might think they are not is that the others are numerous, and they dictate through a large number of decisions that are often visible only in the aggregate.

At the same time, however, these intuitions reveal something significant about the notion of equality of opportunity -- something [*185] that begins to erase the distinction between equality of opportunity and equality of result. The apparent fluidity and unpredictability of markets is a result of what might be described as their democratic character. In a market-oriented meritocracy, the forces that determine success or failure are democratic in the sense that they are the product of a multitude of personal decisions. The intuition that this is a regime of equality derives from the sense that everyone is subject to these forces; no one person can control them, and no one is exempt from them.

In this sense, the market-oriented meritocratic regime can be said to be one of equality of opportunity. It is manifestly untrue that everyone has an

equal chance to succeed, or that everyone has an equal chance to control his or her destiny. It is true, however, that no identifiable person or, if the markets are operating as they should, self-conscious group of persons, can dictate another's fate. n24

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n24 In fact, even if markets operate as they should, they reward people only for satisfying desires as those desires are revealed in the market. Many important kinds of desires are not adequately accounted for in the market. For a well-known discussion, see Amartya K. Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, 6 PHIL. & PUB. AFF. 317 (1977).

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D. Democratic Equality in Markets and Governments

In reality, therefore, the so-called equality of opportunity in a market-oriented meritocratic regime is not that everyone has an equal chance to succeed, but that no one has a greater chance than anyone else to determine who will succeed. In practice, of course, this will often not be true; some individuals will have power in the market. But the meritocratic conception is an ideal: there is equality of opportunity when markets operate perfectly. To the extent that markets are imperfect, there is inequality.

The claim of those who use the rhetoric of equality of opportunity and result is that equality of opportunity, conceived as a market-oriented meritocratic principle, is different from equality of result, understood as a government action designed to offset the effects of the market. In fact, however, the kind of equality involved in the two cases is the same.

[*186] Once we understand that the equality of a meritocracy is equality not in the chance to succeed, but in the chance to influence others' ability to succeed, there is nothing distinctive about meritocracy. The same democratic characteristics that arguably make a meritocracy a regime of equality are present elsewhere. Most notably, of course, these characteristics are present in a well-functioning democratic government. In a well-functioning democracy, as in a well-functioning market economy, decisions are impersonal in the sense that they are not the product of the will of an identifiable individual.

Specifically, in a well-functioning democracy, every person has an equal opportunity to succeed by persuading her fellow citizens to provide her with benefits -- in the same sense that, in a well-functioning market economy, every person has an equal opportunity to create a new mousetrap. In both cases some will fail. But in both cases, success will be determined by apparently impersonal forces rather than by the will of an identifiable individual. This is the only sense in which markets provide equality of opportunity. Democratic decisionmaking provides equality in exactly the same sense. I do not make the converse claim; there is a kind of equality in democratic decisionmaking that is lacking in markets, because greater resources give an individual greater relative power in the market. Nonetheless, the equality of well-functioning markets is present in well-functioning democracies.

What does it mean to refer to a "well-functioning" democracy? Under either of two conceptions of democracy, democratic decisions equalizing results

afford the same kind of equality as the so-called equality of opportunity that characterizes market-oriented meritocracy. It is not necessary to assume that a democratic system always pursues the public interest or to reject "public choice" accounts that treat political outcomes as the product of self-interested behavior. n25 If democracy is a pluralist struggle among self-interested groups, then democratic decisions will provide the same kind of equality as a market, so long as no one group or coalition [*187] can entrench itself in power. n26 Indeed, the pluralist view is deliberately modeled after the theory of the market. n27

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n25 See generally DENNIS C. MUELLER, PUBLIC CHOICE II (1989).

n26 A well-known description of this form of pluralist democracy is found in ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

n27 See, e.g., ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY chs. 21-23 (3d ed. 1950).

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Alternatively, if democratic politics is characterized by an effort to promote the public interest, conceived in a way that treats everyone fairly, then this form of equality of opportunity is again present. n28 Specifically, in either of these forms of democratic society, people will have an opportunity to persuade their fellow citizens to advance their interests -- just as in the market, people have an opportunity to succeed by satisfying others' desires. Some efforts at persuasion will fail -- some will be doomed from the start -- but that is true of efforts in the market as well. In a well-functioning democracy, under either the pluralist or public interest model, outcomes are not dictated by individuals or cohesive groups of individuals. Outcomes are the result of forces that cannot be identified with any individual: either the market-mimicking dynamic of pluralist democracy, or the disinterested inquiry into the public interest. Of course, democracy can function badly in a variety of ways. "Equality of result" might be imposed by a dominant group. Then the kind of equality found in well-functioning markets will be absent. But markets can also be imperfect -- not just when there is concentration in an industry, but in more routine cases of agency and information costs that allow, for example, a bureaucratic superior to exercise unwarranted power over a subordinate.

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n28 See, e.g., RAWLS, supra note 9, at 359-61.

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There is much room for debate (and of course much debate) over whether the market or democracy is more likely to malfunction, how often, and how badly. Those are complex questions that depend heavily on empirical knowledge. My point is only that the dichotomy -- equality of opportunity is characteristic of market-oriented meritocracy; equality of result is characteristic of democratic decisionmaking -- is misconceived. When markets function well, they are characterized by something that can plausibly be called equality of

opportunity. But that same kind of equality is present in well-functioning democratic decisionmaking. When both markets [*188] and democratic governments function correctly, the kind of equality displayed in the markets is also present in the government.

IV. CONCLUSION

Equality of opportunity is a powerful ideal. It is, however, more complex than it first appears, and the contrast between equality of opportunity and equality of result is not a useful one. Understood in perhaps the most natural sense -- as a requirement that a person's fortunes not be determined by accidents of birth or other factors over which he or she has no control -- equality of opportunity has very powerful implications. It calls for massive equalization of results.

Understood in a different sense -- as a characteristic of a market-oriented meritocratic regime -- equality of opportunity does not necessarily call for such dramatic measures. But the meritocratic conception of equality of opportunity is a conception of equality only in a very specialized way. People have equal opportunities only in the sense that their chances for success are not dictated by identifiable others. The same kind of equality inheres in well-functioning democratic political arrangements that bring about equality of result by altering market outcomes. Arguments for equality of opportunity and equality of result rest on the same foundations, and the rhetoric that contrasts them is more misleading than valuable.

LEVEL 1 - 90 OF 96 ITEMS

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ARTICLE: STRIPPED DOWN LIKE A RUNNER OR ENRICHED BY EXPERIENCE: BIAS AND IMPARTIALITY OF JUDGES AND JURORS

MARTHA MINOW *

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* Professor of Law, Harvard University. A.B., University of Michigan, 1975; M. Ed., Harvard University, 1976; J.D., Yale Law School, 1979. A version of this Essay was delivered as the James Gould Cutler Lecture at the Marshall-Wythe School of Law at the College of William and Mary on October 21, 1991. A further discussion of related issues appears in Martha Minow, Equalities, 88 J. PHIL. 633 (1991). The author would like to thank Betsy Fishman, Marjorie Sheldon, and the editors of the William and Mary Law Review for their fine assistance. Thanks also to Joe Singer, Elena Kagan, Frank Michelman, Avi Soifer, and Elizabeth V. Spelman.

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SUMMARY:
... First, let me ask whether we know bias when we see it. ... A potential juror poses the danger of bias when he or she is too close to the parties or the issue at hand. ... Yet they both advance a different view of bias and impartiality. ... Departure from a white male perspective, however, does not necessarily mean bias. ... If the decisionmaker herself were a victim of sexual harassment, some might worry that she would be unduly inclined to believe and favor the complainant. ... They also might worry about true accusations and seek to show their ability to overcome any appearance of bias by coming down hard on the accused. ... Four Justices signed the plurality opinion in which Justice Kennedy reasoned that the prosecutor offered explanations for his challenges, explanations sufficiently unrelated to race, and that thus no intentional discrimination occurred. ... (4) that the exclusion of Latinos from the jury leaves a jury that can be perceived as fair and impartial in a case involving a Latino defendant (and, in this case, Latino victims as well). ... But the issue of perspective is unusually pronounced in evaluations of the movie Thelma & Louise. ...

In phase one of the Senate Judiciary Committee hearings on the nomination of Clarence Thomas to serve as Associate Justice of the United States Supreme Court, Thomas testified that as a judge, "'You want to be stripped down like a runner," and "shed the baggage of ideology.'" n1 One observer commented that Thomas "painted a vivid image of a man methodically ridding himself not only of old ideas and even the desire to form new ones, but also of traits and attitudes that have formed the essence of his adult personality." n2 At the same time,

his supporters argued that a man "who has experienced and overcome poverty and racial discrimination in his own life brings an important and perhaps irreplaceable perspective to the court." n3 Beginning with his opening presentation, Thomas presented himself as someone unburdened by a political perspective, yet enriched by his experiences of poverty and racial discrimination and therefore attentive to the concerns of disadvantaged people. n4

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n1 Linda Greenhouse, The Thomas Hearings: In Trying to Clarify What He Is Not, Thomas Opens Question of What He Is, N.Y. TIMES, Sept. 13, 1991, at A19 (quoting Judge Clarence Thomas). At another point, responding to a question from Senator Dennis DeConcini, Thomas said,

I think it's important for judges not to have . . . baggage. I think . . . it is important for us . . . to eliminate agendas, to eliminate ideologies. And when one becomes a judge . . . you start putting the speeches away. You start putting the policy statements away. You begin to decline forming opinions in important areas that could come before your court because you want to be stripped down like a runner.
David Broder, Thomas Backs Democrats into a Corner, CHI. TRIB., Sept. 15, 1991, at 3.

n2 Greenhouse, supra note 1, at A19.

n3 Broder, supra note 1, at 3.

n4 Greenhouse, supra note 1, at A19.

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After the second phase of committee hearings following the leak of Anita Hill's charges that Thomas sexually harassed her -- the portion that Thomas called a "high-tech lynching" n5 -- the tension over perspective and impartiality only became compounded. Thomas explained that he had come to better and personally understand the need for rights for the accused. n6 He emphasized his own right to privacy and demonstrated deep concern about the operation of racial sterotypes. n7 Yet he also attacked liberal interest groups and the press, as well as the Senate itself, for staging the high-tech lynching. He conveyed his disrespect for everyone responsible for the process.

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n5 137 CONG. REC. S14,632 (daily ed. Oct. 15, 1991)(statement of Sen. Byrd).

n6 See Richard L. Berke, The Thomas Nominations: Thomas Backers Attack Hill, N.Y. TIMES, Oct. 13, 1991, at 1.

n7 Id.

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Do these experiences render him less, or more, qualified for the position he now serves on the United States Supreme Court? Will he be able to strip

himself of his anger toward the Senate when he reviews questions of congressional intent? Will he be able to assure litigants of his impartiality in sexual harassment cases, in cases involving freedom of the press, or in cases addressing senatorial decisions?

These questions expose intense confusion about bias, impartiality, knowledge, and experience. This confusion permeates contemporary American legal thought, especially concerning the selection of judges and juries. The confusion is particularly pronounced because the ultimate goal of fairness in our society includes notions of representation as well as ideas of neutrality. The jury is to reflect a fair cross-section of the community. n8 Yet the very existence of peremptory challenges, which give litigants the power to strike a certain number of participants from the jury without having to state any reason, n9 creates tension with the goal of a cross-section in the very process of permitting the parties some modicum of control over what they perceive to be fair or advantageous at trial. The Supreme Court has ruled that peremptory challenges affecting the composition of both civil and criminal juries must not intentionally exclude participants on the basis of race or gender so as to undermine the goal of a fair cross-section of the community. n10

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8 See Taylor v. Louisiana, 419 U.S. 522, 526 (1975)(noting that the American concept of jury trial contemplates jury drawn from cross-section of community); Hernandez v. Texas, 347 U.S. 475, 482 (1954)(holding that conviction by unrepresentative jury violates equal protection). Even judicial elections, as the Supreme Court ruled last year, are governed by the Voting Rights Act. Chisom v. Roemer, 111 S. Ct. 2354 (1991).

n9 Swain v. Alabama, 380 U.S. 202, 220 (1965).

n10 See, e.g., Holland v. Illinois, 493 U.S. 474 (1990); Batson v. Kentucky, 476 U.S. 79 (1986). Challenges for cause more directly address the issue of bias. I focus here on the use of peremptory challenges rather than challenges for cause in the shaping of juries.

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My goal in this Essay is to consider three contrasting views of bias and their relationships to the ideal of fair representation in the selection of juries and judges. As a nation, we seem to want those who sit in judgment to have no axes to grind, no prejudgments about the people or issues they confront. We also want them to have the ability to empathize with others, to evaluate credibility, to know what is fair in this world, not in a laboratory. And we want jurors and judges to have, and to remember, experiences that enable their empathy and evaluative judgments. This ambivalence, I will suggest, reflects a misunderstanding of the preconditions for impartiality and of the role of fair representation in producing impartial jurors and panels of judges. Common sense, case law, fiction, and even movies illuminate these questions.

TEXT:
[*1203] I. Do We Know Bias When We See It ?

First, let me ask whether we know bias when we see it. Consider the cartoon depicting a judge with a large nose and mustache, looking down from the bench

at a defendant with the same nose and mustache. The judge declares: "Obviously, not guilty." n11 This cartoon illustrates the usual meaning of bias. It refers to an inclination, a predilection, that interferes with impartiality. A potential juror poses the danger of bias when he or she is too close to the parties or the issue at hand. By knowing the people involved, by having a direct stake in the proceeding, or by having had a very similar kind of experience as the one under scrutiny, the potential juror may lack or appear to lack the distance necessary to judge fairly.

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n11 Charles Barsotti, NEW YORKER, Nov. 21, 1988, at 55.

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Normally, we think that a person is or appears to be biased toward friends, family members, or business associates. This view reflects a sharp departure from the early conception of a jury as a group of people from a community who knew the parties and who could serve as witnesses to give evidence about the dispute. n12 It is one of those curious historical transformations -- much like the transformation of the term "jury of one's peers" from a reference to nobles to a reference to random cross-sections of society. The jury for Oliver North excluded anyone who had [*1204] followed or even heard about his testimony in the congressional Iran-Contra hearings. n13 The jury included thus only members of that odd group of people who were able to sequester themselves from a major topic of broad public interest and discussion.

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n12 VALERIE P. HANS & NEIL VIDMAR, JUDING THE JURY 23-24 (1986).

n13 North Jury Selection Bogs Down: Public Familiarity with Him Poses Problem, Judge Says, L.A. TIMES, Jan. 31, 1989, at 1.

Thomas felt compelled to state that he had never discussed Roe v. Wade, 410 U.S. 113 (1973), with anyone. See The Thomas Hearings: Excerpts from Senate's Hearings on the Thomas Nomination, N.Y. Times, Sept. 12, 1991, at A20.

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TTo be fair, this notion of removal reflects the desire to guard against prejudice -- to avoid those who prejudge the issues at hand. A juror who has been exposed to pretrial publicity might have or seem to have a view about the merits of the case or the virtues and vices of one or more parties. The question remains, however: how is bias to be tested? A majority of the Supreme Court has recently ruled that the issue of bias in the face of pretrial publicity is avoided when the jurors report to the court that they think they can be fair. n14 The jurors' subjective reflections may be one component of any proper impartiality inquiry, but I wonder whether this is sufficient. A juror may not fully understand either the meaning or the demands of impartiality; the juror may miscalculate his or her ability to put aside knowledge that could prejudice judgment. In addition, the simple appearance of bias may damage the basic commitment to a fair trial process.

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n14 Mu'Min v. Virginia, 111 S. Ct. 1899, 1908 (1991).

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Variations on such questions of evidence and proof abound. For example, who has the burden of showing that a prospective juror is actually prejudiced? In a homicide case, one juror attended church with the mother of the decedent but was nonetheless allowed to serve on the jury. n15 A Supreme Court majority refused to grant certiorari in the case despite Justice Marshall's dissenting view that the defendant ought not to bear the burden of showing actual prejudice when the probability of bias was so great. n16

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n15 Porter v. Illinois, 479 U.S. 898 (1986).

n16 Id. at 901 (Marshall, J., dissenting from denial of certiorari).

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Aside from such questions of proof, the first notion of bias begins to emerge with some clarity. A juror may be or may seem biased because of personal experience with the parties or exposure to publicity about their conduct. That juror seems too close to the matter at hand to render a fair and objective judgment.

Does this mean that no bias arises if the juror is in the opposite situation? What if the juror is extremely far from the matter at [*1205] hand in either personal experience or knowledge? Professor Lon Fuller once discussed the danger that jurors called to judge a sailor charged with threatening another with bodily harm would not understand the mores of the waterfront and would attribute too much to testimony that the defendant had said in the past that he would "'stick a knife in [someone's] guts and turn it around three times.'" n17 Is it possible to risk actual bias, or its appearance, by having a total absence of experience or knowledge of the issue or evidence at hand? To be able to evaluate statements of witnesses, a jury needs sufficient knowledge of the witnesses' worlds to place their statements in context. Moreover, to be able to render judgment, jurors need sufficient knowledge of the life experiences of those before them to make sense of testimony and motivations. Even when women were excluded from jury service, for example, Anglo-American tradition provided for the use of midwife juries on occasions in which knowledge of pregnancy or childbirth would be critical to a reliable judgment. n18 Perhaps that practice also reflected some delicacy of feeling about whose ears should hear such intimate female matters; perhaps the practice embodied a notion of expertise rather than impartiality. n19

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n17 Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 391 (1978).

n18 See LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 128-29 (2d ed. 1988).

n19 Cf. Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. CAL. L. REV. 1877, 1912 n.121 (1988) (proferring differences between male and female judgments as explanation of exclusion and inclusion of women on juries).

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Certainly arguments for the inclusion of women and African-Americans on juries have long encompassed the view that female and African-American litigants deserved the chance to be evaluated by those with shared experiences. n20 Some commonality is necessary to know enough to judge. Admittedly, this argument blends into the notion of a fair cross-section of the community regarded as an independently important concern about the jury. Both the appearance of fairness and the fact of equality in the jury selection process matter even apart from issues about what knowledge is necessary to judge fairly. But the Supreme Court has acknowledged that impartiality is served by juries that [*1206] represent a fair cross-section of the larger society. n21 Although the distribution of knowledge and experience may not be equal, the collective deliberation process by a jury that is a fair cross-section will temper the dangers of ignorance. n22

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n20 See Douglas Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 CORNELL L. REV. 1, 6 (1990); Carol Weisbrod, Images of the Woman Juror, 9 HARV. WOMEN'S L.J. 59, 80 (1986).

n21 See Holland v. Illinois, 493 U.S. 474, 480-81 (1990). But see id. at 495 (Marshall, J., dissenting)(arguing that the fair cross-section requirement serves purposes different from impartiality).

n22 This goal may be jeopardized by extremely long trials, because a cross-section of the population is unlikely to be able to disengage from other commitments to serve on a jury for such a trial. For this reason, among others, some have proposed breaking long trials into smaller parts that can be heard by different panels, as Judge Robert Keeton has suggested to me in conversation.

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A confluence of the goals of fair representation and impartiality thus exists. Both include a basic idea about the distribution of experiences necessary to render fair judgments. The Clarence Thomas of September who sought to establish his impartiality, therefore, announced that he would retain his experiences of poverty and racial discrimination and his "'underlying concerns and feelings about people being left out, about our society not addressing all the problems of people.'" n23 Only a year earlier, David Souter had felt the need to convey to the Senate and to the watching public that despite a life as a bachelor and loner, he had women friends n24 and that once as a college adviser he had even counseled a young woman who contemplated an abortion. n25 Experience and familiarity with human emotions bring a judge or juror within the circle of people entitled and equipped to judge others. More particularly, both Thomas and Souter sought to establish that they had experiences with points of view not well represented at the high court. This reflects an admission that the Court's impartiality is threatened if it appears, because of its own narrow

membership, to lack an understanding of the broad range of people who come before it.

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n23 Greenhouse, supra note 1, at A19 (quoting Judge Clarence Thomas).

n24 See, e.g., Alan McConagha, Souter's First Love: His Work, WASH. TIMES, July 26, 1990, at A6.

n25 Ruth Marcus & Michael Isikoff, Souter Declines Comment on Abortion: Nominee Moves to Dispel Image as Judge Lacking Compassion, WASH. POST, Sept. 14, 1990, at A1.

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A third kind of bias remains. It is perhaps the most elusive to state, and it also may be controversial to discuss. I want to explore it because I myself am suspicious of dualities. I am troubled by the suggestion that bias may arise when one is too close to but not when one is too far from a problem; but I am equally troubled by the idea that these two are the only dimensions that matter. Let us consider another dimension. Although [*1207] someone may seem unbiased and removed from a matter, he or she may be implicated and seem not to be because of unexamined assumptions about the baseline used to judge neutrality and impartiality.

Consider a case involving a charge of sex discrimination against a law firm. In one such case, the defendant law firm asked Judge Constance Baker Motley to recuse herself from the case because she, as a black woman who had once represented plaintiffs in discrimination cases, would identify with those who suffer race or sex discrimination. n26 The defendant invoked the notion that the judge would be too close to the case. The defendant assumed that Judge Motley's personal identity and her past legal work deprived her of impartiality. Judge Motley declined to recuse herself and explained:

If background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds. n27

Similarly, Judge Leon Higginbotham once was asked to remove himself from a race discrimination case because he is an African-American. n28 In declining, he noted that "black lawyers have litigated in the federal courts almost exclusively before white judges, yet they have not urged that white judges should be disqualified on matters of race relations." n29

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n26 Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975).

n27 Id. at 4.

n28 Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 156-57 (E.D. Pa. 1974).

n29 Id. at 177.

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Judge Motley and Judge Higginbotham may be understood to suggest that they are no more too close to the matter than judges of a different race or sex might be too far from it. Yet they both advance a different view of bias and impartiality. They mean to expose the assumption that the neutral baseline against which to evaluate bias is the vantage point of a white male. They mean to show that even whites and males have a vantage point that can and should be evaluated for bias. Departure from a white male perspective, however, does not necessarily mean bias. Judge Motley and Judge Higginbotham mean to demand a more particularized showing of bias than an assertion of sex or race, [*1208] and also to remind any who need reminding that men as well as women have a sex, and whites as well as blacks have a race. These categories implicate us all. If being implicated means bias, then everyone is biased, and perhaps then no one can judge. That result is unacceptable, but it helps suggest a norm of inclusion to govern who may serve as judge or jury. It points out the danger of considering an initial appearance of bias without probing how others may be similarly but more subtly implicated in the issue of bias.

Consider a problem chosen not at random -- a case arising from a charge of sexual harassment. If brought before a woman judge or before women jurors some might worry about biased decisionmakers. If the decisionmaker herself were a victim of sexual harassment, some might worry that she would be unduly inclined to believe and favor the complainant. As polls conducted during Clarence Thomas's Senate hearings demonstrate, women who have been harassed may instead be skeptical of another woman's claims. n30 Perhaps the complainant did not respond the way the adjudicator did or would have; perhaps the complainant appears disloyal or otherwise blameworthy in the eyes of the adjudicator. These alternatives simply point to the multiple directions that bias may take, but not to its absence. Would restricting decisionmaking to a man or group of men be any better? Some people worried that Anita Hill's charges were not taken seriously enough by the Senate Judiciary Committee in part because the Committee was composed entirely of men who seemed not to comprehend the seriousness of the problem. n31 Some argue that the presence of even just one woman Senator would have made a difference on this score. n32 This is an asserted connection between notions of fair representation or cross-section and the impartiality necessary to judge the significance of a charge.

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n30 Felicity Barringer, The Thomas Confirmation: Hill's Case Is Divisive to Women, N.Y. TIMES, Oct. 18, 1991, at A10.

n31 See, e.g., Carol Kleiman, After Senate's Thomas-Hill Debate, Two Women Seek Entry to Men's Club, CHI. TRIB., Feb. 24, 1992, at 5.

n32 See id. The confidence with which this point is uttered is challenged somewhat by the position of Senator Nancy Kassebaum, who voted in favor of confirming Clarence Thomas when the question reached the full Senate. Nevertheless, unlike some of her male colleagues, Senator Kassebaum also refused to be "a party to an intellectual witch hunt against Professor Hill." The Thomas Confirmation: Women in Senate Have Their Say Before the Vote Confirming Thomas, N.Y. TIMES, Oct. 16, 1991, at A18.

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But a different line of criticism can be applied to a panel of male adjudicators of sexual harassment claims. Those adjudicators might identify with the accused and might worry about [*1209] being accused themselves. They might worry about false accusations and the difficulty of rebutting them. They might worry about true accusations, yet not believe them serious enough to warrant public sanction. They also might worry about true accusations and seek to show their ability to overcome any appearance of bias by coming down hard on the accused.

I do not mean to suggest that everyone is equally or identically biased. I do mean to suggest that commonplace notions of being too close or too far from the parties or the problem at hand inadequately capture the issue of bias. Instead, people's multiple perspectives on a problem may diverge in different ways from the ideal of impartiality. For that very reason, a collaborative decisionmaking process involving people reflecting those multiple perspectives exhibits the special virtue of a jury or multijudge panel compared with a single judge. The value of consultation is enhanced not merely by the presence of more than one mind but also by the presence of more than one vantage point. n33 This is another way of saying that fair representation and impartiality converge.

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n33 A single judge can try to engage in an imaginative dialogue with people with different vantage points on the problem at hand. Cf. HANNAH ARENDT, BETWEEN PAST AND FUTURE: SIX EXERCISES IN POLITICAL THOUGHT 220-21 (1961) (suggesting that judgment derives its validity from agreement of individuals with various perspectives).

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II. CRITICIZING THE SUPREME COURT

The Supreme Court's decision last Term in Hernandez v. New York n34 provides an occasion to test these comments and in turn, to test the Supreme Court. In Hernandez, the prosecution tried a case against a Latino criminal defendant and used its peremptory challenges to exclude jurors who failed to assure the prosecutor adequately that they could defer to the official English translation of any Spanish-language testimony. n35 The defendant claimed that the resulting jury violated equal protection guarantees because it effectively excluded all Spanish-proficient jurors. n36

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n34 111 S. Ct. 1859 (1991) (plurality opinion).

n35 Id. at 1864-65. The prosecution also used its peremptory challenges to exclude jurors with family members who had been convicted of crimes. Id. at 1864.

n36 Id. at 1866-67.

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The case sharply divided the Supreme Court. n37 Four Justices signed the plurality opinion in which Justice Kennedy reasoned [*1210] that the prosecutor offered explanations for his challenges, explanations sufficiently unrelated to race, and that thus no intentional discrimination occurred. n38 These Justices did not rely on the view that ethnicity or language proficiency are unrelated to race. They could have relied on the fact that many people who speak Spanish are not Latinos and that many Latinos do not speak Spanish, but they did not. n39 Indeed, Justice Kennedy's opinion includes a rather remarkable statement about the close relationships between language and identity and between language and ethnicity, close enough at times to justify equal protection scrutiny on the basis of language proficiency. n40 To reject the defendant's claim, therefore, Justice Kennedy's opinion had to reason that a prima facie showing of an equal protection violation had been rebutted by the absence of proof that the prosecutor intended to exclude based on race. n41

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n37 Four members of the Court signed Justice Kennedy's plurality opinion, id. at 1864, two members signed another opinion authored by Justice O'Connor, id. at 1873, Justice Stevens wrote a dissent joined by Justice Marshall, id. at 1875, and Justice Blackmun dissented separately while indicating agreement with one part of Justice Stevens's dissent, id. at 1875.

n38 Id. at 1866-67.

n39 The plurality opinion did reject the defendant's claim that a close correlation between Spanish proficiency and Latino identity would be sufficient to treat exclusion of Spanish-proficient jurors as exclusions of Latinos. Yet the plurality acknowledged that, at least in this case, the exclusion of Spanish-proficient jurors had the effect of excluding virtually all Latinos. Id. at 1867.

n40 Id. at 1868.

n41 Id. at 1868-69.

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The plurality argued more specifically that the prosecutor had offered a neutral explanation for the peremptory challenges: the Latino jurors raised doubts for the prosecutor when they hesitated before they answered that they would try to defer to the official English translation of Spanish testimony at the trial. n42 This doubt, the plurality claimed, was unrelated to race or ethnicity. Some Latinos would give no such grounds for doubt, and some non-Latinos would. Thus, the plurality found that the exclusions were not based on race. n43

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n42 Id. at 1864-65.

n43 Id. at 1867.

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But let us examine the exclusions more closely. Why would it be legitimate to worry about a juror who could not ignore testimony given by witnesses, and not therefore need to defer solely to a court translator's version? Two linked reasons might be at stake. This Spanish-proficient juror might base judgment on information unavailable to other jurors and this juror might [*1211] claim special knowledge and authority in the course of the jury deliberations. Why are these worrisome instead of desirable traits for a juror? These worries arise only if one supposes:

(1) that the normal juror would not know Spanish;

(2) that only the official English translation of Spanish testimony should be used in the jury's deliberations;

(3) that people who do not speak Spanish adequately can fairly judge people who do; and

(4) that the exclusion of Latinos from the jury leaves a jury that can be perceived as fair and impartial in a case involving a Latino defendant (and, in this case, Latino victims as well).

Underscoring these suppositions is Justice Kennedy's endorsement of the trial court's conclusion that, because Latino jurors might be sympathetic to both the Latino defendant and to the Latino victims and witnesses, it is not discriminatory to exclude Latino jurors; the sympathies wash out. n44 This view neglects not only Latinos in the community who view trial participation as a civic right but also ignores all those troubled by the omission of an entire perspective and knowledge base from the jury. Moreover, it also wrongly implies that only Latinos have sympathies in cases involving Latinos.

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n44 Id. at 1871-72 (deferring to the trial court's finding).

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Treating only Spanish-speaking Latinos as a problem, the plurality cited a case "which illustrates the sort of problems that may arise where a juror fails to accept the official translation of foreign-language testimony." n45 In United States v. Perez, n46 a juror asked the judge if it would be possible to ask the translator about the meaning of a particular term. The translator had interpreted the word to mean a public bar although the juror thought it meant a restroom. The judge indicated that questions could be put only to the judge, not to the interpreter. The interpreter nonetheless volunteered that jurors "are not to listen to the Spanish but to the English. I am a certified court interpreter." n47 At this point, the transcript produced by the court reporter indicated that the juror called the translator an "idiot." n48 The juror later explained, however, that she had said, "It's an idiom." n49 (We have several layers of interpretation problems here!) The juror was dismissed from the jury. n50

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n45 Id. at 1867 n.3 (citing United States v. Perez, 658 F.2d 654 (9th Cir. 1981)).

n46 658 F.2d 654.

n47 Id. at 662.

n48 Hernandez, 111 S. Ct. at 1867.

n49 Id.

n50 Id.

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[*1212] This episode, offered by Justice Kennedy as evidence of the sort of problems that may arise when a juror fails to accept the official translation of foreign-language testimony, may also indicate the sorts of problems that arise when the trial process fails to accommodate people who are bilingual. The juror's question was treated as an intrusion rather than as an effort to get at the truth; the witness's testimony, she suggested, would make more sense if it referred to a restroom rather than a bar. The court interpreter reacted defensively, and the judge responded by banishing the inquiring juror from the trial.

This story contrasts sharply with a case in which a man got into a fight in a bar with another man and killed him. n51 Both men were Mexican-Americans. The offender argued that his victim had given him "el ojo," meaning, "the eye." n52 At that time, no Mexican-Americans were eligible to serve on juries in Texas, where the incident occurred. n53 The defendant was convicted of murder. As one observer noted about the case:

"Anglos have a big thing about eye contact being something positive. You can take a man's measure by making contact. . . . Hell, in the Mexican community eye contact can kill you. It sends the other guy a message that says what the hell are you lookin' at, and if you don't like it, do something about it. In a bar that can lead to a killing. But if you don't know that you can't relate to what it means. And unless jurors understand the difference between el ojo and eye contact, the defendant is not being tried by a jury of his peers." n54

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n51 See Hernandez v. State, 251 S.W.2d 531 (Tex. Crim. App. 1952), rev'd sub nom. Hernandez v. Texas, 347 U.S. 475 (1954).

n52 THOMAS WEYR, HISPANIC U.S.A.: BREAKING THE MELTING POT 83 (1988).

n53 Hernandez, 251 S.W.2d at 533.

n54 WEYR, supra note 52, at 83 (quoting Gilbert Pompa).

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The Supreme Court of the United States essentially agreed. In 1954, the Supreme Court -- the same Court that decided Brown v. Board of Education n55

-- reversed the conviction. n56 The Court was composed of Justices quite different from those serving on the present Court. The present Court has moved away from recognizing language, ethnic, and racial differences as important dimensions of American life and dimensions to be integrated throughout our institutions. Instead, the Court seems to fear differences and to desire to exclude those people it fears. Because [*1213] Spanish-speakers soon will probably become a majority in parts of California and Texas, n57 these exclusions would be carried out in the name of a minority mistaken about the actual norm.

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n55 347 U.S. 483 (1954).

n56 Hernandez v. Texas, 347 U.S. 475 (1954).

n57 See, e.g., Lily Eng & Bob Schwartz, City's Latinos on the Grow, L.A. TIMES, Feb. 26, 1991, at B1; cf. Product Development Needed for Growing Hispanic Population, UPI, July 21, 1988 (noting that one in four Texans will be Hispanic by the year 2000), available in LEXIS, Nexis Library, UPI File.

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What if the Supreme Court instead exposed for discussion the assumption that English-speaking and not bilingual jurors are the norm? Even in last year's case, a majority of the Justices, in separate opinions, considered ways to change the jury to accommodate bilingual jurors. Six of the nine Justices proposed that jurors proficient in a language used by witnesses be given an opportunity to indicate to the judge any problems they detect with the translations. n58 The plurality acknowledged the "harsh paradox that one may become proficient enough in English to participate in trial," given the English-language ability requirements for federal jury service, "only to encounter disqualification because he knows a second language as well." n59 Nevertheless, for these Justices, the treatment of bilingual jurors remained a marginal concern, largely relegated to footnotes. The assumption that the non-Spanish speaking juror is the impartial decision-maker contributed to this failure. The problem of bias for juries and for judges arises not only when they are too close to or too far from those they judge but also when they fail to identify an entrenched and biased assumption about whose perspective is the norm.

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n58 Hernandez v. New York, 111 S. Ct. 1859, 1868 (1991) (plurality opinion); id. at 1877 (Stevens, J., dissenting).

n59 Id. at 1872.

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The arguments for a jury that is a fair cross-section of the community only strengthen this critique. n60 To be perceived as fair by the entire community, to accord all citizens a chance to serve as jurors, and to grant parties the opportunity to be heard by their peers, the jury should reflect a fair cross-section of the community. Such a cross-section is more likely to bring

to bear knowledge critical to evaluating evidence, credibility, and justice in a given case.

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n60 Those arguments include the rights of the parties to be evaluated by a jury of their peers, the rights of potential jurors to serve, and the prerequisites for public confidence in the process of trial. See Holland v. Illinois, 493 U.S. 474, 495 (1990) (Marshall, J., dissenting).

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[*1214] III. PREJUDICE VS. PRIOR KNOWLEDGE

In case I seem to have implied that bias and prejudice are not problems for juries and judges, let me turn to a distinction between prejudice and prior knowledge. I believe that an important distinction does exist. Prejudice interferes with impartiality. Prior knowledge may assist impartiality, however, if coupled with a willingness to be surprised, rather than always confirmed. Let me offer into evidence a short story by James Baldwin, entitled Sonny's Blues. n61

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n61 James Baldwin, Sonny's Blues, in HOW WE LIVE: CONTEMPORARY LIFE IN CONTEMPORARY FICTION 747 (Penney Chapin Hills & L. Rust Hills eds., 1968).

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It is a story of two brothers, both African-American. One brother, the narrator, served in the Army and then became a high school math teacher, a husband, and a father. His younger brother, Sonny, became a heroin addict, a convicted felon, and a jazz pianist. n62 The school teacher ignored Sonny during the initial period of Sonny's incarceration. But when the teacher's daughter dies of polio, Sonny writes him a heartfelt letter. n63 They then stay in touch, and when Sonny is released, they reunite. But the teacher is wary, concerned that Sonny will continue to use drugs. He simultaneously feels guilty and worries that he is not fulfilling his mother's last wish that he watch out for his brother. n64 Sonny tells his brother he knows that he may start using drugs again. n65

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n62 Id. at 748-50, 761-62.

n63 Id. at 751.

n64 His mother had said, "'It ain't only the bad ones, nor yet the dumb ones that gets sucked under,'" id. at 756, and then she told him about his uncle who had been lynched, id. at 757. She said, "'You got to hold on to your brother . . . and don't let him fall, no matter what it looks like is happening to him and no matter how evil you gets with him.'" Id. at 757-58. She added, "'You may not be able to stop nothing from happening. But you got to let him know you's there.'" Id. at 758.

n65 Id. at 768.

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Reluctantly, the teacher accepts Sonny's invitation to join him at a nightclub. For the first time, he hears Sonny play the piano. n66 It is Sonny's first return to the instrument since his time in prison. The teacher-narrator notes: "All I know about music is that not many people ever really hear it. And even then, on the rare occasions when something opens within, and the music enters, what we mainly hear, or hear corroborated, are personal, private, vanishing evocations" different from what is evoked for the person making the music. n67 Drenched with his prior knowledge [*1215] and suspicion of Sonny, and with feelings of guilt, the narrator still tries to discern what Sonny feels as he plays. He begins to recognize the dialogue between Sonny and the musician playing the bass fiddle. The bass player "wanted Sonny to leave the shoreline and strike out for the deep water. He was Sonny's witness that deep water and drowning were not the same thing -- he had been there, and he knew." n68 The narrator watches his brother move from absence to real presence with the other musicians and then join them in finding new ways to make the audience listen to the not-new story of human suffering. n69 The narrator is brought to his own memories but also to a new respect for his brother, a man who chose not the norms of middle-class respectability, but expression of human experience through the blues.

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n66 Id. at 769.

n67 Id. at 770.

n68 Id.

n69 Id. at 771.

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The narrator is not asked to judge Sonny, although he does so. Nonetheless, the story suggests the difference between prejudging a matter, even when prejudice is based on actual knowledge, and the use of prior knowledge as part of a process of opening up to the possibility of surprise. The story suggests the difference between mulling over personal, private evocations and attending to the situation of another person. The story also suggests that, initially, the shared past and experiences of the two brothers stand as a barrier to mutual understanding. Later, however, the narrator is able to integrate his memories of his parents and his brother into a new understanding and respect for the path Sonny takes. It may be too much to suggest that we are all brothers and sisters in this way, although such an attitude need not interfere with impartiality if we try to use what we know to remain open to surprises about one another. I have used this story in teaching judges n70 and often asked these questions: "If you were asked to sentence Sonny in a new drug charge, would you want to know about the piano playing? Would you want to hear it? Would you want to include as judges and juries people who know Sonny's world or only people with no knowledge of it? Is there anyone who is not implicated in it?"

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n70 See Martha Minow, Words and the Door to the Land of Change: Law, Language, and Family Violence, 43 VAND. L. REV. 1665, 1689-95 (1990).

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Let me contrast this story with the recent movie Thelma & Louise. n71 Two women plan a weekend away from the men in their [*1216] lives, but they quickly find trouble at a honky-tonk. A man starts dancing with Thelma, then makes sexual advances toward her. When she resists, he violently starts to rape her. Louise appears with a gun, the man stops, but he shows no remorse, and Louise kills him. The rest of the movie follows their journey as outlaws, trying to escape legal repercussions. The movie includes their encounter with a truck driver who repeatedly makes gross sexual advances toward them and their fantasy revenge against him. The movie concludes with their suicide in a world aiming to capture and punish them, a world they do not believe could understand them.

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n71 THELMA & LOUISE (MGM-Pathe 1991).

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The film triggered considerable press. In Boston, the Globe ran side-by-side columns: A woman's review was entitled, She Loves It; n72 a man's review: He Hates It. n73 The Boston Globe has its own problems of perspective. A common prediction about that paper is that if a nuclear bomb fell on New York, the headline in the Boston Globe would read: "Hub Man Injured in Explosion." n74 But the issue of perspective is unusually pronounced in evaluations of the movie Thelma & Louise. Some charge the movie with stereotyping men and giving bad role models for women. Others cheer its depiction of women fighting back in a world they find unsafe and inhospitable. Perhaps only a law professor would like best a particular line in the movie. It is uttered as the two women discuss how police and prosecutors would not understand how a woman who danced with a man could establish his sexual advances were unwanted. Thelma says, "Law is some tricky shit." n75 That statement summarizes the conviction that the male-dominated legal system will not understand how a woman could charge rape after she flirted with a man or how a woman could be excused or forgiven for killing a man after he had stopped raping a woman. Perhaps the polarized reviews confirm their doubt. In a way, Anita Hill's experience could be described as "Thelma and Louise Meet the Supreme Court Nomination Process -- and Discover How Unsafe and Inhospitable the Senate is from a Woman's Point of View."

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n72 Diane White, She Loves It, BOSTON GLOBE, June 14, 1991, at 29.

n73 John Robinson, He Hates It, BOSTON GLOBE, June 14, 1991, at 29.

n74 "Hub" is the Globe's abbreviation for Boston as the hub of the universe. See Ask the Globe, BOSTON GLOBE, Sept. 8, 1990, at 60.

n75 THELMA & LOUISE, supra note 71.

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I put the film forward here for a different reason. I wonder whether the film, like the story, Sonny's Blues, asks us to use [*1217] what we know but to suspend our conclusions long enough to be surprised, to learn. One of the actresses who starred in Thelma & Louise said that people who find that the film mistreats men are identifying with the wrong characters. n76 She invites all viewers to identify with the journey of self-discovery and self-criticism undertaken by Thelma and Louise. They know they have done something wrong, and the film does not excuse them. But it invites understanding and wagers that gender is no obstacle to that. None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.

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n76 See Judith Michaelson, Downright Serious: With "Thelma & Louise," Geena Davis Is Forging a New Image, Closer to Her Own Reality of a Woman Who Takes Care of Her Life, L.A. TIMES, May 12, 1991, at 5 (quoting Geena Davis).

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IV. PREJUDICE, PRIOR KNOWLEDGE, AND THE SUPREME COURT

This prompts me, once more, to consider the situation of Justice Clarence Thomas, both as judge and as someone to be judged. Three versions of what has happened to him have emerged:

(1) The Republican story, put most cogently by the nominee himself, of a high-tech lynching, a process spun out of control through the manipulations of liberal interest groups, Senate staff members, and ambitious press people who conspired to produce a charge of sexual harassment, delay its evaluation, leak it at the eleventh hour, and prompt a circus-like hearing besmirching Thomas's good name.

(2) The Democratic story of a terrible process, but one with no better alternative, because the Constitution calls upon the Senate to advise and consent to presidential nominations, because the complainant's demand for confidentiality delayed consideration of the charge of harassment, and because an unfortunate leak to the press brought to public attention this serious charge and required public resolution.

[*1218] (3) The baptism-by-fire theory, according to which we have witnessed a process of intensive job training, with the result that Clarence Thomas may end up emphatically defending privacy, and the rights of the accused. He criticized racial stereotypes and concluded that his own integrity mattered

more than ambition -- in contrast to positions he had taken previously.

I want to believe the third story, and Thomas himself has testified to it. n77 But he has also indicated his fury at the Senate, his disdain for liberal interest groups and, it seems, apparent disrespect for many Democrats and press people. n78 To some observers, he seems untrustworthy on questions of sexual harassment, perhaps even a lying perpetrator.

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n77 See Neil A. Lewis, The Thomas Swearing-In: After Ordeal of Senate Confirmation, Views on Thomas's Court Opinions, N.Y. TIMES, Oct. 19, 1991, at 8.

n78 See Peter G. Gosselin, Thomas Says He'll Fight to the End, BOSTON GLOBE, Oct. 13, 1991, at 1.

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Will Thomas now recuse himself from cases of sexual harassment? From cases involving liberal interests groups or Democratic Senators? These matters will remain with his conscience. To be fair, we should not use our metaphoric peremptory challenges against him. But to earn the respect of the public, he must indicate how he will draw on the parts of his past that he claimed taught him about people left out, disadvantaged, and misunderstood. It would help if he worked to prompt other Justices to make explicit the assumptions they take for granted about whose perspective is neutral and whose is biased. It would help if he does not strip himself down like a runner, but instead acknowledges his own situation as a brother n79 implicated in the lives of others and able to be surprised while he builds upon what he already knows.

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n79 Thomas's treatment of his sister in a speech commenting on her dependency on Aid to Families with Dependent Children gave some critics another ground for attack, because he seemed to register callous disregard for her difficult times, ignorance about the gender difference that had contributed to their contrasting life stories, and recklessness with the truth. See Joel F. Handler, The Judge and His Sister: Growing up Black, N.Y. TIMES, July 23, 1991, at A20 (letter to the Editor).

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Essay: Subsidized Speech*

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SUMMARY:
... From its inception, therefore, First Amendment doctrine has primarily sought to protect from government regulation an independent realm of speech within which public opinion is understood to be forged. ... Yet they have never been explicitly addressed by the Court, which has instead chosen to address cases of subsidized speech primarily by relying upon two doctrines, which respectively prohibit unconstitutional conditions and viewpoint discrimination. ... These examples demonstrate that the presence or absence of a subsidy is not determinative of whether speech will be classified as within or outside the domain of public discourse. ... Rehnquist's observation rests on the fallacy that subsidization is always sufficient to determine the status of speech, whereas there are circumstances in which subsidized speech will be classified as within public discourse and in which the selective withdrawal of subsidies will be deemed an improper regulation of that discourse. ... A. Viewpoint Discrimination, Subsidized Speech, and Managerial Domains ... The argument, if fully articulated, would be that Congress enacted Title X to accomplish certain purposes, that these purposes are legitimate, and that the HHS regulations function within this managerial domain to regulate speech so as to achieve these purposes. ... We must decide, therefore, how the NEA "decency clause" should be characterized: as a conduct rule directly regulating public discourse or instead as a decision rule directing NEA officials to intervene in public discourse to achieve a distinct objective. ...

TEXT:
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In 1931, at the very dawn of First Amendment jurisprudence, Chief Justice Hughes presciently observed that "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people" was "a fundamental principle of our constitutional system." n1 Since that time, the First Amendment has been interpreted by courts primarily as a

guarantor of the ongoing legitimacy of democratic self-governance in the United States. As Justice Cardozo remarked in 1937, freedom of expression is "the matrix, the indispensable condition, of nearly every other form of freedom." n2

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n1. Stromberg v. California, 283 U.S. 359, 369 (1931).

n2. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

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To view the First Amendment "as the guardian of our democracy," n3 however, is to adopt a particular image of the American polity. It is to imagine that democratic legitimacy flows from the accountability of the state to the public opinion of its population. From its inception, therefore, First Amendment doctrine has primarily sought to protect from government regulation an independent realm of speech within which public opinion is understood to be forged.

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n3. Brown v. Hartlage, 456 U.S. 45, 60 (1982).

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The consequence of this orientation is that traditional First Amendment doctrine has had rather little to say about the speech of the government itself. n4 In this Essay, I shall explore the corner of this perplexing territory in which [*152] are located the difficult constitutional questions raised by government subsidies for speech. Subsidized speech challenges two fundamental assumptions of ordinary First Amendment doctrine. It renders uncertain the status of speakers, forcing us to determine whether speakers should be characterized as independent participants in the formation of public opinion or instead as instrumentalities of the government. And it renders uncertain the status of government action, forcing us to determine whether subsidies should be characterized as government regulations imposed on persons or instead as a form of government participation in the marketplace of ideas.

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n4. Steven Shiffrin, in Government Speech, 27 UCLA L. Rev. 565, 569-70 (1980), credits Laurence Tribe and Mark Yudof for most prominently noting this proposition. See also Laurence Tribe, Toward a Metatheory of Free Speech, 10 Sw. U. L. Rev. 237, 244-45 (1978); Mark Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 Tex. L. Rev. 863 (1979).

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These two questions of social characterization underlie all constitutional cases of subsidized speech. n5 Like many First Amendment issues, they demand complex and contextual normative judgments about the boundaries of distinct constitutional domains in social space. n6 Yet they have never been explicitly addressed by the Court, which has instead chosen to address cases of

subsidized speech primarily by relying upon two doctrines, which respectively prohibit unconstitutional conditions and viewpoint discrimination.

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n5. I do not, of course, mean to imply that these two questions of social characterization exhaust the constitutional issues that can be posed by cases of subsidized speech. I mean only to claim that such cases will, at a minimum, require a response to these two questions.

n6. For a general discussion, see Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249 (1995).

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Both of these doctrines ignore the questions of social characterization that actually impel First Amendment analysis, and as a consequence, each doctrine has grown increasingly detached from the real sources of constitutional decisionmaking. The doctrines have become formalistic labels for conclusions, rather than useful tools for understanding. It is no wonder that the haphazard inconsistency of the Court's decisions dealing with subsidized speech has long been notorious; the precedents have rightly been deemed "confused" and "incoherent, a medley of misplaced epigrams." n7

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n7. William T. Mayton, "Buying-Up Speech": Active Government and the Terms of the First and Fourteenth Amendments, 3 Wm. & Mary Bill Rts. J. 373, 376 (1994); see David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675, 682 (1992); Martin H. Redish & Daryl I. Kessler, Government Subsidies and Free Expression, 80 Minn. L. Rev. 543, 544-45 (1995); Michael J. Elston, Note, Artists and Unconstitutional Conditions: The Big Bad Wolf Won't Subsidize Little Red Riding Hood's Indecent Art, Law & Contemp. Probs., Summer 1993, at 327, 333, 341-42, 358; Gary Feinerman, Note, Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection, 43 Stan. L. Rev. 1369, 1378 (1991); Michael Fitzpatrick, Note, Rust Corrodes: The First Amendment Implications of Rust v. Sullivan, 45 Stan. L. Rev. 185, 196 (1992). See generally Rodney A. Smolla, Free Speech in an Open Society 183 (1992).

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My thesis in this Essay is that cases of subsidized speech can be usefully analyzed only if we fashion a doctrine that explicitly addresses relevant processes of social characterization. I hope to establish this thesis by demonstrating its value in the comprehension of particular cases. In Part I of this Essay, therefore, I examine FCC v. League of Women Voters n8 to explore the consequences of characterizing government action as a regulation of speech [*153] located in the democratic social domain called "public discourse." n9 In Part II of this Essay I scrutinize the cases of Rosenberger v. Rector and Visitors of the University of Virginia n10 and Rust v. Sullivan n11 to probe the implications of characterizing government action as a regulation of speech located in a different kind of social formation, which may be termed the "managerial domain." n12 In Part III of this Essay I discuss the recent controversy over funding restrictions imposed by statute upon the National

Endowment for the Arts to assess the implications of characterizing government action as a regulation of public discourse or instead as a form of state participation in the marketplace of ideas.

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n8. 468 U.S. 364 (1984).

n9. See Robert C. Post, Constitutional Domains: Democracy, Community, Management 6-10 (1995).

n10. 115 S. Ct. 2510 (1995).

n11. 500 U.S. 173 (1991).

n12. See Post, supra note 9, at 4-6.

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I. Subsidized Speech and Public Discourse

A democratic government derives its legitimacy from the fact that it is considered responsive to its citizens. This form of legitimacy presupposes that citizens are, in the relevant sense, independent of their government. We would rightly regard a government that treated its citizens as mere instrumentalities of the state - "closed-circuit recipients of only that which the state chooses to communicate," n13 - as totalitarian rather than democratic. One important function of the public/private distinction within American constitutional law is to mark this normative distinction between the independent citizen, who is deemed "private," and the state functionary, who is deemed "public." n14

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n13. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969).

n14. For a full discussion, see Post, supra note 9, at 188-89, 280-82. The public/private distinction, of course, bears many different kinds of meanings, only one of which I am exploring here.

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What it means in constitutional thought for a democratic government to be "responsive" to its citizens is a complex subject. To summarize arguments I have made elsewhere, n15 First Amendment doctrine envisions a distinct realm of citizen speech, called "public discourse," n16 in which occurs a perpetual and unruly process of reconciling the demands of individual and collective autonomy. First Amendment jurisprudence conceptualizes public discourse as a site for the forging of an independent public opinion to which democratic legitimacy demands that the state remain perennially responsive. That is why the First Amendment jealously safeguards public discourse from state censorship.

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n15. See Robert Post, Between Democracy and Community: The Legal Constitution of Social Form, 35 NOMOS 163 (John W. Chapman & Ian Shapiro eds., 1993).

n16. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988).

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Because First Amendment restraints on government regulation of public discourse are meant to embody the value of democratic self-governance, they [*154] contain within them many powerful and controversial presuppositions. They assume, for example, the existence of a domain of democratic self-determination, in which persons are independent and autonomous. n17 Within the democratic domain of public discourse, persons must be given the freedom to determine their own collective identity and ends. n18 Outside of public discourse, however, where the value of democratic self-governance is not preeminent, First Amendment doctrine will reflect other constitutional values, and it will presuppose a quite different notion of the legal subject. n19 The nature of First Amendment analysis, therefore, will depend on whether or not speech is conceptualized as within the democratic domain of public discourse. n20

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n17. See Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. Colo. L. Rev. 1109, 1128-33 (1993).

n18. See id. at 1116-19.

n19. See Post, supra note 6, at 1277.

n20. On the boundaries of public discourse, see Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601, 667-84 (1990).

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This is of particular importance in cases of subsidized speech. When the state supports speech, it establishes a relationship between itself and private speakers that can sometimes compromise the independence of the latter. Subsidization may thus transport speech from public discourse into other constitutional domains. But because there are many examples of subsidized speech that are unproblematically characterized as within public discourse, the mere fact of subsidization is not sufficient to remove speech from public discourse. Subsidization is only one factor that must be considered when making judgments about the characterization of speech. n21 In this Part of the Essay I explore the nature of these judgments, examining the process and consequences of classifying subsidized speech as within or outside of public discourse.

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n21. On the highly contextualized nature of such judgments, see id.

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A. Unconstitutional Conditions, Subsidized Speech, and Public Discourse

That subsidization simpliciter is not determinative of the classification of speech, and that such classification has fundamental and far-reaching consequences for First Amendment analysis, was recently recognized by the Court in its opinion in Rosenberger v. Rector and Visitors of the University of Virginia, n22 which struck down a state university's policy of excluding religious expression from its subsidies of student speech. The Court observed:

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n22. 115 S. Ct. 2510 (1995).

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When the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the [*155] government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.... When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

It does not follow, however,... that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.... The distinction between the University's own favored message and the private speech of students is evident in the case before us. n23

The Court's point is that when the state itself speaks, it may adopt a determinate content and viewpoint, even "when it enlists private entities to convey its own message." n24 But when the state attempts to restrict the independent contributions of citizens to public discourse, even if those contributions are subsidized, First Amendment rules prohibiting content and viewpoint discrimination will apply. The reasoning of Rosenberger thus rests on two premises. First, speech may be subsidized and yet remain within public discourse; the mere fact of subsidization is not sufficient to justify classifying speech as within or outside public discourse. Second, substantive First Amendment analysis will depend on whether the citizen who speaks is characterized as a public functionary or as an independent participant in public discourse.

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n23. Id. at 2518-19 (citations omitted).

n24. Id. at 2518; see Laurence H. Tribe, American Constitutional Law 12-4, at 807-08 (2d ed. 1988); Cole, supra note 7, at 702-04 (enumerating justifications for government-supported speech). But cf. Jesse H. Choper, Securing Religious Liberty: Principles For Judicial Interpretation of the Religion Clauses 106-07 (1995). I defer to Part III the question of whether the First Amendment places any constraints on government expression of such viewpoints.

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This second premise may seem obvious, but it has important implications for the doctrine of unconstitutional conditions. That doctrine, as characterized by one eminent commentator, "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." n25 Thus in Perry v. Sindermann n26 the Court held that a state college system could not fire a teacher due to his public criticisms of the system, because "even though a person has no "right' to a valuable governmental benefit and even though the [*156] government may deny him the benefit for any number of reasons,.... it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech." n27

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n25. Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989).

n26. 408 U.S. 593 (1972).

n27. Id. at 597.

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Of course this formulation is essentially circular, because it does not specify the nature of the First Amendment rights to be protected, and in particular, it fails to specify whether the parameters of those rights are contingent upon the granting of the benefit. n28 The most common way of interpreting the unconstitutional conditions doctrine, therefore, is to hold that it prohibits the government from doing "indirectly what it may not do directly," n29 so that First Amendment rights are defined independently of the provision of the benefit.

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n28. See Brooks R. Fudenberg, Unconstitutional Conditions and Greater Powers: A Separability Approach, 43 UCLA L. Rev. 371, 388-93 (1995).

n29. Sullivan, supra note 25, at 1415; see Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1921 (1995) (discussing indirect limitations of state powers under Tenth Amendment).

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In cases of subsidized speech, however, the provision of a benefit can sometimes convert a citizen into a public functionary and thereby alter the

nature of the relevant First Amendment rights and analysis. The abstract principles underlying the unconstitutional conditions doctrine simply do not address this possibility. Sophisticated efforts to repair the doctrine by incorporating pertinent but generic criteria like "baselines" n30 or "systemic effects" n31 also fail to account for the fact that the categorization of the status of a speaker will ordinarily be a very specific, context-bound judgment, informed by the particular First Amendment considerations relevant to determining the boundaries of public discourse.

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n30. Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1359-74 (1984); Sullivan, supra note 25, at 1489.

n31. Sullivan, supra note 25, at 1490.

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With regard to questions of subsidized speech, therefore, the doctrine of unconstitutional conditions, as Cass Sunstein has noted, is "too crude and too general to provide help in dealing with contested cases." n32 The doctrine serves primarily to remind us that First Amendment analysis does not end merely because the government has chosen to act through the provision of a subsidy. The doctrine recalls the truth of the first premise that we observed in the passage from Rosenberger: Speech may be subsidized and yet nevertheless remain within public discourse, so that even though the state may retain the "greater" power to terminate the subsidy (and perhaps also the speech), it does not follow that it also retains the "lesser" power to control the speech in ways [*157] that are otherwise inconsistent with First Amendment restraints on government regulations of public discourse.

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n32. Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 620 (1990); see also William P. Marshall, Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses, 26 San Diego L. Rev. 243, 244 (1989) (analyzing doctrine in relation to religion clauses).

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The public forum cases provide the most obvious illustration of how persons can receive government benefits and nevertheless remain within public discourse. These cases hold that speech occurring on certain kinds of government property, like streets and parks, will be "subject to the highest scrutiny." n33 Chief Justice Rehnquist has acknowledged that "this Court has recognized that the existence of a Government "subsidy,' in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity,'or have been "expressly dedicated to speech activity.'" n34 Publications that receive the "subsidy" extended by the United States to second-class mail provide another example of subsidized speech that receives significant First Amendment protection. n35 Receipt of the subsidy does not remove such publications from

the safeguards otherwise accorded public discourse. n36

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n33. International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).

n34. Rust v. Sullivan, 500 U.S. 173, 199-200 (1991) (citations omitted).

n35. See Hannegan v. Esquire, Inc., 327 U.S. 146, 151 (1946); see also Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (finding public campaign financing permissible subsidy); Mark G. Yudof, When Government Speaks: Politics, Law, and Government Expression in America 234-35 (1983) (listing examples of government speech subsidies).

n36. See Speiser v. Randall, 357 U.S. 513, 518 (1958) (holding First Amendment limits Congress's power to regulate mail); see also United States v. Van Leeuwen, 397 U.S. 249, 251-52 (1970); Sherbert v. Verner, 374 U.S. 398, 404-05 (1963); Hannegan v. Esquire, Inc., 327 U.S. 146, 155-56 (1946); Tollett v. United States, 485 F.2d 1087, 1090 (8th Cir. 1973); O'Brien v. Leidinger, 452 F. Supp. 720, 725 (E.D. Va. 1978); United States v. Lethe, 312 F. Supp. 421, 425-26 (E.D. Cal. 1970).

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These examples demonstrate that the presence or absence of a subsidy is not determinative of whether speech will be classified as within or outside the domain of public discourse. Subsidized speech that is classified as public discourse will receive similar kinds of First Amendment protections as are extended to public discourse generally. It follows from this that (then) Justice Rehnquist could not have been correct when he observed in Regan v. Taxation with Representation that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." n37 Rehnquist's observation rests on the fallacy that subsidization is always sufficient to determine the status of speech, whereas there are circumstances in which subsidized speech will be classified as within public discourse and in which the selective withdrawal of subsidies will be deemed an improper regulation of that discourse. Consider, for example, the fatal constitutional difficulties that would arise if a state were to exclude speech about nuclear power or abortion from [*158] a public forum, or if Congress were to withhold second-class mailing subsidies from magazines that discuss these issues. n38

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n37. 461 U.S. 540, 549 (1983). Justice Rehnquist did observe that "the case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ""aim at the suppression of dangerous ideas."'" Id. at 548 (citations omitted). However, as the examples offered in the following paragraph in the text indicate, constitutional restraints on governmental use of subsidies to regulate speech in public discourse would apply to discrimination that is content-based as well as viewpoint-based.

n38. Cf. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (invalidating state prohibition of policy-oriented speech on monthly bills of public utilities).

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If subsidized speech can sometimes be classified as public discourse, it can also, as Rosenberger recognizes, be deemed equivalent to the speech of the state itself. Such speech will not be conceptualized as requiring protection from the government, but will instead be regarded as state action, and hence subject to the same array of constitutional restraints and prerogatives that we accord to the government. n39 Some have claimed that the mere fact of a state subsidy is sufficient to justify classifying speech as state action. For example, a government official recently testified that "when the government funds a certain view, the government itself is speaking. It therefore may constitutionally determine what is to be said." n40 We know from the public forum and U.S. mail cases, however, that this assertion is false. Government funding is not by itself sufficient to establish state action in other contexts, n41 and there is no reason why we should reach a different conclusion within the context of subsidized speech.

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n39. For a good discussion of government participation in the system of freedom of expression, see CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973); Thomas I. Emerson, The System of Freedom of Expression 697-716 (1970). On the extreme difficulty of these questions, see Shiffrin, supra note 4, at 572-605; Yudof, supra note 4, at 871-72. The obvious differences between the speech of private persons and the speech of the state have recently featured prominently with respect to the Court's Establishment Clause jurisprudence, which has tended to stress, as Justice O'Connor has put it, the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990); see also Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2522 (1995) (applying Mergens distinction).

n40. First Amendment Implications of the Rust v. Sullivan Decision: Hearing on First Amendment Implications of the Rust v. Sullivan Decision Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 102d Cong. 11 (1991) [hereinafter Hearings] (statement of Leslie H. Southwick, Deputy Ass't Att'y Gen., Civil Div., U.S. Dep't of Justice).

n41. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding acts of privately operated school whose income is derived primarily from public sources are not state action); Polk County v. Dodson, 454 U.S. 312 (1981) (holding that public defender's actions do not constitute state action).

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B. FCC v. League of Women Voters: Subsidized Speech and the Constitutional Characterization of Speakers

One of the striking peculiarities of First Amendment jurisprudence is that speakers can be assigned intermediate positions between private participants in public discourse and state actors. The clearest and most illuminating example of the Court's creation of such an intermediate status may be found in the context of the broadcast media. In 1969, in Red Lion Broadcasting Co. v. FCC, n42 the

Court upheld FCC regulations that would have been plainly unconstitutional if applied to participants in public discourse. n43 At issue in [*159] Red Lion was the fairness doctrine, which required broadcasters to give adequate coverage to opposing views of public issues, as well as subsidiary FCC rules requiring that those personally attacked be given a right to reply.

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n42. 395 U.S. 367 (1969).

n43. See FCC v. National Citizens' Comm. for Broad., 436 U.S. 775, 800 (1978).

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The Court began its reasoning with the premise that broadcast frequencies were scarce: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." n44 The Court thereupon characterized broadcast licenses as conferring a "temporary privilege" n45 to use designated frequencies on the condition that a licensee "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." n46

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n44. Red Lion, 395 U.S. at 388.

n45. Id. at 394.

n46. Id. at 389.

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Red Lion thus conceptualized broadcasters as public trustees, n47 rather than as independent and private participants in public discourse. As a consequence, the Court interpreted the First Amendment as protecting not the broadcasters' independent contributions to public discourse, but instead the speech facilitated by broadcasters. The Court carefully refrained from attributing First Amendment rights to broadcasters: "The people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of the broadcasters, which is paramount." n48

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n47. See id. at 389-90.

n48. Id. at 390.

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Four years later, however, members of the Court began to have second thoughts. Four Justices in CBS, Inc. v. Democratic National Committee n49 held, in a complex and fractured decision, that although broadcasters were "public trustees," their speech was not that of the government itself, and hence that the behavior of broadcasters did not constitute state action for purposes of triggering constitutional requirements. n50 These Justices were concerned to craft an intermediate position for broadcasters, one that envisioned an [*160] "essentially private broadcast journalism held only broadly accountable to public interest standards." n51

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n49. 412 U.S. 94 (1973).

n50. Such an outcome, Chief Justice Burger noted, would subordinate "journalistic discretion" to "the rigid limitations that the First Amendment imposes on Government." Id. at 121. Other Justices noted that it would convert broadcasters into "common carriers" and "thus produce a result wholly inimical to the broadcasters' own First Amendment rights." Id. at 140 (Stewart, J., concurring); see also id. at 149-65 (Douglas, J., concurring). Justices White, Powell, and Blackmun did not reach the question of state action. See id. at 146-48. Justices Brennan and Marshall would have found that

> the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives.

Id. at 173 (Brennan, J., dissenting).

n51. Id. at 120.

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This compromise was ratified by the full Court in 1981, when it declared that "the broadcasting industry is entitled under the First Amendment to exercise "the widest journalistic freedom consistent with its public [duties].'" n52 In stark contrast to Red Lion, the Court went out of its way to refer to the need to "properly balance[ ] the First Amendment rights of... the public... and broadcasters." n53 It thus signified that while broadcasters would be seen in some respects as public fiduciaries, without independent First Amendment rights, they would be regarded in other respects as participants in public discourse, with attendant constitutional protections. This resolution seems plainly necessary to explain why the Court has persistently attributed the full spectrum of First Amendment rights and protections to broadcast journalists when they are sued for defamation and invasion of privacy. n54

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n52. CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)); see also City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

n53. CBS, Inc. v. FCC, 453 U.S. 367, 397 (1981); see also id. at 396.

n54. See, e.g., Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); cf. Herbert v. Lando, 441 U.S. 153 (1979) (analyzing proposed privilege under substantive First Amendment doctrine).

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I mention this compromise because it provides the necessary background for grasping an extraordinarily complex and fascinating case involving subsidized speech, FCC v. League of Women Voters. n55 The case involved the constitutionality of section 399 of the Public Broadcasting Act, which prohibited "editorializing" by any "noncommercial educational broadcasting station" receiving grants from the Corporation for Public Broadcasting (CPB), "a nonprofit corporation authorized to disburse federal funds to noncommercial television and radio stations." n56 Section 399 was justified on the ground that public deliberation could be distorted by potential government pressure on the editorial policies of government-supported broadcast stations.

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n55. 468 U.S. 364 (1984).

n56. Id. at 366.

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Because this justification turned on an empirically based theory of potential danger to the structure of public deliberation, one might have expected the Court, as Justice Stevens urged in dissent, to "respect" the "judgment" of Congress. n57 But Justice Brennan, writing for the Court, introduced a new variable into the equation:

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n57. Id. at 416 (Stevens, J., dissenting); see also FCC v. National Citizens' Comm. for Broad., 436 U.S. 775, 801-02 (1978).

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We have... made clear that broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area. Unlike common [*161] carriers, broadcasters are "entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties].'" n58

By specifically invoking the First Amendment rights of broadcasters, Brennan signalled that broadcasters could be conceptualized as independent

contributors to public discourse and accordingly could be protected by independent judicial review.

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n58. League of Women Voters, 468 U.S. at 378 (citations omitted). Brennan's position represents an implicit reversal of his earlier opinion in CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973).

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If broadcasters were to be regarded as public trustees without independent First Amendment rights in some circumstances, and as constitutionally protected private participants in public discourse in other circumstances, how ought they be classified with respect to a prohibition on their ability to editorialize? Brennan's response was clear and unequivocal: "The special place of the editorial in our First Amendment jurisprudence simply reflects the fact that the press, of which the broadcasting industry is indisputably a part, carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs." n59

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n59. League of Women Voters, 468 U.S. at 382 (citation omitted).

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Broadcast editorials, like those of the press generally, were thus categorized constitutionally as "part and parcel of "a profound national commitment... that debate on public issues should be uninhibited, robust, and wide-open.'" n60 Broadcasters, when disseminating editorials, were to be classified as independent contributors to public discourse; like the press generally, they were to be regarded as possessing the self-determining agency of private citizens.

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n60. Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

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Noncommercial educational stations, however, are not equivalent to private broadcasters; they are supported in part by federal financial assistance channelled through CPB. It was therefore possible to argue that noncommercial educational stations were public functionaries, even if broadcasters generally could not be so characterized. Indeed, in CBS, Inc. v. Democratic National Committee, nearly a decade before, Justice Douglas had made exactly this point. n61 He contrasted the independent status of commercial broadcasters to CPB's noncommercial grantees, whom he regarded as owned and managed by a federal agency and hence as instrumentalities of the state constrained by the First Amendment to act as common carriers. n62

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n61. See 412 U.S. at 149-50 (Douglas, J., concurring).

n62. See id. (Douglas, J., concurring).

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Justice Brennan rejected this characterization of noncommercial stations. He pointed to "the elaborate structure established by the Public Broadcasting Act" n63 that was specifically designed to "protect the stations from [*162] governmental coercion and interference." n64 Brennan concluded that the structure of the Act "ensured... that these stations would be as insulated from federal interference as the wholly private stations." n65 The status of the noncommercial stations would thus be classified as equivalent to that of broadcasters generally.

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n63. League of Women Voters, 468 U.S. at 388-89.

n64. Id. at 389.

n65. Id. at 394. For a good discussion of the success of this insulation, see Yudof, supra note 35, at 124-35.

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Notice, then, that before the opinion in League of Women Voters can even begin to engage in what would ordinarily be regarded as First Amendment analysis, it must accomplish at least three predicate acts of characterization: with regard to broadcasters; with regard to broadcasters' editorials; and with regard to noncommercial broadcasters' editorials. Each time, the opinion opts for characterizing section 399 as a government regulation of public discourse. n66 These characterizations enable Brennan to use a familiar arsenal of First Amendment doctrines to decide the case. Brennan attacks section 399 for its "substantial interference with broadcasters' speech," n67 for its content-based discrimination, n68 for its vagueness, n69 for its "patent overinclusiveness and underinclusiveness," n70 for the weakness of its justifications, n71 and for its failure to accomplish its ends by using "less restrictive means that are readily available." n72 All of these doctrinal methods are appropriately applied to regulations of public discourse; none was used in Red Lion because in that case broadcasters were broadly conceived of as public functionaries.

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n66. For a cross-cultural perspective on this characterization, see Monroe E. Price, Television: The Public Sphere and National Identity 35 (1995).

n67. League of Women Voters, 468 U.S. at 392.

n68. See id. at 384.

n69. See id. at 392-93.

n70. Id. at 396.

n71. See id. at 391, 396.

n72. Id. at 395.

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The specific question of subsidized speech is relevant to only one of the three predicate acts of characterization that make the decision in League of Women Voters possible. The case illustrates that although the fact of government support is relevant to classifying a speaker as within or outside public discourse, it is not determinative. The subsidy question differs in neither form nor function from the other issues of characterization posed by the case. Subsidization is merely one of many possible connections between a speaker and the state. All of these connections, including subsidization, must be assessed to determine whether particular speakers in particular circumstances ought constitutionally to be regarded as independent participants in the processes of democratic self-governance, and hence whether their speech ought to receive the First Amendment protections extended to public discourse. [*163] Once subsidized editorials are mapped onto the domain of public discourse, and once section 399's prohibition is characterized as a restriction of that discourse, Justice Rehnquist's dissent, which focuses only on the specific issue of subsidy, is radically undermined. Rehnquist argued that section 399 should be understood as a simple congressional decision "that public funds shall not be used to subsidize noncommercial, educational broadcasting stations which engage in "editorializing.'" n73 Reiterating the theme of his opinion in Regan v. Taxation with Representation, n74 Rehnquist rejected "the notion that, because Congress chooses to subsidize some speech but not other speech, its exercise of its spending powers is subject to strict judicial scrutiny." n75 But, as we have seen, selective congressional subsidies of magazines in second-class mail would indeed be subject to strict judicial scrutiny. n76 This indicates that the thrust of Rehnquist's dissent is quite beside the point once the government regulation at issue is characterized as a restriction on public discourse.

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n73. Id. at 403 (Rehnquist, J., dissenting).

n74. 461 U.S. 540 (1983).

n75. League of Women Voters, 468 U.S. at 405.

n76. See supra notes 35-38 and accompanying text; cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592-93 (1983) (holding that use tax on ink and paper targeting small group of newspapers "places a heavy burden on the State to justify its action"). Strict scrutiny would occur "even where... there is no evidence of an improper censorial motive." Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987).

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The criteria for establishing whether speech ought to be characterized as public discourse are complex, contextual, and obscure, n77 and particularly so in cases of subsidized speech. I am confident that there can be no simple empirical or descriptive line of demarcation. n78 Ultimately, speech will be assigned to public discourse on the basis of normative and ascriptive

judgments as to whether particular speakers in particular contexts should constitutionally be regarded as autonomous participants in the ongoing process of democratic self-governance. n79 Whether explicitly addressed or not, such judgments are essential predicates to all cases of subsidized speech.

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n77. In the case of broadcasters, for example, the rationale of scarcity, upon which the Court has repeatedly relied, is now surely no more than a fiction. See Lucas A. Powe, Jr., American Broadcasting and the First Amendment 200-09 (1987). Even the Court has itself come close to admitting this. See Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994); League of Women Voters, 468 U.S. at 376 n.11. This implies that the actual rationale for characterizing broadcasters as public trustees has not yet been articulated by the Court.

n78. See Post, supra note 20, at 667-84.

n79. Although the scarcity rationale presents itself as a simple empirical fact, that fact cannot, even if true, itself explain the special quasi-public status conferred on broadcasters. All that follows from scarcity is that the state must find some allocation rule to distribute scarce broadcast frequencies. One possible allocation would be to sell frequencies on the open market, just as the government sells scarce state-owned land. The owners of frequencies would then be regarded as purely private speakers. Such a scenario is surely possible, which indicates that its rejection must turn on normative considerations rather than on the bare fact of scarcity.

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[*164]

II. Subsidized Speech and Managerial Domains

Public discourse must be distinguished from domains that I have elsewhere called "managerial." n80 Within managerial domains, the state organizes its resources so as to achieve specified ends. The constitutional value of managerial domains is that of instrumental rationality, a value that conceptualizes persons as means to an end rather than as autonomous agents. Within managerial domains, therefore, ends may be imposed upon persons. n81

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n80. See, e.g., Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713 (1987).

n81. See Post, supra note 9, at 4-6, 10-15.

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Managerial domains are necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon. Yet managerial domains are organized along lines that contradict the premises of democratic self-governance. For this reason, First Amendment doctrine within managerial

domains differs fundamentally from First Amendment doctrine within public discourse. The state must be able to regulate speech within managerial domains so as to achieve explicit governmental objectives. n82 Thus the state can regulate speech within public educational institutions so as to achieve the purposes of education; n83 it can regulate speech within the judicial system so as to attain the ends of justice; n84 it can regulate speech within the military so as to preserve the national defense; n85 it can regulate the speech of government employees so as to promote ""the efficiency of the public services [the government] performs through its employees'"; n86 and so forth. n87

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n82. See Post, supra note 80, at 1767-75.

n83. See Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm. & Mary L. Rev. 267, 318 (1990) (analyzing instrumental regulation of speech within universities).

n84. See Robert C. Post, The Management of Speech: Discretion and Rights, 1984 Sup. Ct. Rev. 169, 201-06 (analyzing instrumental regulation of speech within court system).

n85. See Brown v. Glines, 444 U.S. 348, 354 (1980).

n86. Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)); see Post, supra note 80, at 1814 n.351.

n87. For a more detailed analysis of the management of speech within government institutions, see Post, supra note 80, at 1767-84.

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As a result of this instrumental orientation, viewpoint discrimination occurs frequently within managerial domains. To give but a few obvious examples: the president may fire cabinet officials who publicly challenge rather than support Administration policies; the military may discipline officers who publicly attack rather than uphold the principle of civilian control over the armed forces; public defenders who prosecute instead of defend their clients may be sanctioned; prison guards who encourage instead of condemn drug use may be chastised. Viewpoint discrimination occurs within managerial domains whenever the attainment of legitimate managerial objectives requires it. n88

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n88. For a theoretical discussion of viewpoint discrimination in nonpublic forums, see id. at 1824-32.

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I stress this point because if there is one constitutional principle that the Court has continuously reiterated as restraining the regulation of subsidized [*165] speech, it is that such regulation cannot discriminate on the basis of viewpoint. n89 Yet it is quite common for subsidized speech to be located within managerial domains. The general principle forbidding viewpoint discrimination must therefore be false with respect to such subsidized speech.

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n89. See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2147-48 (1993); Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983); Smolla, supra note 7, at 184.

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A. Viewpoint Discrimination, Subsidized Speech, and Managerial Domains

The Court's recent opinion in Rosenberger v. Rector and Visitors of the University of Virginia n90 amply displays the confusion caused by the Court's announced prohibition on viewpoint discrimination. In an opinion by Justice Kennedy, the Court held that "the requirement of viewpoint neutrality in the Government's provision of financial benefits" n91 rendered unconstitutional the University of Virginia's refusal to extend subsidies to student speech promoting religious views. But the Court had already held in other contexts that "[a] university's mission is education" and hence that a public university is endowed with the "authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." n92 A public university is therefore a managerial domain dedicated to the achievement of education, and, as one might expect, public universities routinely regulate the speech of faculty and students in ways required by that mission.

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n90. 115 S. Ct. 2510 (1995).

n91. Id. at 2519.

n92. Widmar v. Vincent, 454 U.S. 263, 268 n.5 (1981); cf. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its "basic educational mission,'even though the government could not censor similar speech outside the school.") (citation omitted). For a fuller analysis of free speech within the university, see Post, supra note 83, at 317-25.

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Justice Kennedy, realizing this, used the language of public forum doctrine, the only doctrinal category currently possessed by the Court capable of expressing the requirements of managerial domains, to observe that a school can create a "limited public forum" by reserving its resources "for certain groups or for the discussion of certain topics." n93 In this way Justice Kennedy authorized the University of Virginia to distinguish between speakers and speech as necessary to serve its mission. He thus authorized such commonsense and necessary practices as chemistry departments' restricting their grants to students studying chemistry, or English departments' restricting their grants to students studying English. But, Justice Kennedy insisted, "we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed [*166] impermissible when directed against speech otherwise within the forum's limitations." n94

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n93. Rosenberger, 115 S. Ct. at 2516-17.

n94. Id. at 2517.

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This distinction between content and viewpoint discrimination is simply untenable within the context of a managerial domain. In ordinary language, we would say that a content-based regulation is one that is keyed to the meaning of speech, whereas a viewpoint-based regulation is one that intervenes into a specific controversy in order to advantage or disadvantage a particular perspective or position within that controversy. n95 Justice Kennedy clearly adopts this sense of the distinction in Rosenberger, for he notes that "discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination," and that in the particular case before him "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." n96

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n95. See Paul B. Stephan III, The First Amendment and Content Discrimination, 68 Va. L. Rev. 203, 218 (1982); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 197-200 (1983); Luba L. Shur, Note, Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest, 81 Va. L. Rev. 1665, 1692 (1995).

n96. Rosenberger, 115 S. Ct. at 2517. The difference between viewpoint and content discrimination is, in Justice Kennedy's account, intrinsically unstable and therefore always potentially arbitrary. References to religious speech may refer to either content or viewpoint discrimination, depending upon the circumstances that are deemed salient. In the context, say, of a course on the history of religious thought, the category of "religious speech" may refer merely to the meaning of speech. But in the context of a dispute between advocates of evolution and partisans of creationism, the category may refer to a particular viewpoint. It is not the category of religious speech that is determinative, therefore, but the social situation in which the category is deployed. As Elena Kagan rightly observes:

The very notion of viewpoint discrimination rests on a background understanding of a disputed issue. If one sees no dispute, one will see no viewpoints, and correspondingly one will see no viewpoint discrimination in any action the government takes. Similarly, how one defines a dispute will have an effect on whether one sees a government action as viewpoint discriminatory.

Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 Sup. Ct. Rev. 29, 70 (footnote omitted). The problem with Justice Kennedy's opinion is that he does not explain how to characterize the social situation

in which a regulation is to be categorized as either viewpoint-based or content-based.

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If the distinction between viewpoint and content discrimination is understood in this way, however, it is irrelevant to the regulation of speech within managerial domains. In such settings, speech is necessarily and routinely constrained on the basis of both its content and its viewpoint. Academic evaluations of students and faculty are regularly based upon viewpoint. Historians who deny the Holocaust are not likely to receive appointments to reputable departments; students who deny the legitimacy of the taxing power of the federal government are not likely to receive high grades in law schools. The same principles apply to university decisions concerning the subsidization of speech. So, for example, no First Amendment [*167] issue would be raised if a graduate student who proposed to study the mythical combustive element phlogiston were to be refused a research grant by the chemistry department of a public university, however much the student were to complain about discrimination against her view of the causes of chemical reactions. The constitutionality of the refusal would instead turn on whether the chemistry department's criteria for awarding grants were related to its legitimate educational mission. That the department had both the purpose and effect of discriminating against the student's particular viewpoint would properly be deemed immaterial.

This argument suggests that the Court's effort to distinguish content from viewpoint discrimination is fundamentally confused, at least within managerial domains. I suspect that in fact the Court deploys the distinction to express a quite different point, which can perhaps be understood if one imagines a case in which a chemistry department awards research grants only to students who oppose abortion rights. Although we might be tempted to say about this case that the department's criteria for awarding grants are outrageously viewpoint discriminatory, what we would actually mean is that the criteria are completely irrelevant to any legitimate educational objective of the department.

We may hypothesize, then, that the Court's use of the viewpoint/content distinction, when applied within managerial domains, actually expresses the difference between those restraints on speech that are instrumentally necessary to the attainment of legitimate managerial purposes, and those that are not. If we interpret Rosenberger in this way, we can read the decision as implicitly resting upon the conclusion that the exclusion of speech promoting religious views is irrelevant to any legitimate educational purposes served by the university's grant program. n97 To pursue this question, however, would lead to a full-scale analysis of constitutionally permissible and impermissible educational objectives, a path I do not propose now to pursue. n98

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n97. There is some language in the opinion that suggests the Court might also have had in mind that the student speech supported by the grants was part of public discourse and that the grant program was therefore not part of the managerial operation of the University. The Court refers repeatedly to the "distinction between the University's own favored message and the private speech of students." Rosenberger, 115 S. Ct. at 2519. But this characterization of the grant program is contrary to the University's own assertion that the grants

were designed "to support a broad range of extracurricular student activities that "are related to the educational purpose of the University.'" Id. at 2514 (citation omitted). In fact, the University of Virginia would have a good deal of explaining to do to the taxpayers of the state were its program not fashioned to further the University's actual educational relationship with its students.

A more plausible explanation of the Court's underlying logic, therefore, is that the Court interpreted the actual justification for the University's exclusion of religious speech to rest on the University's desire to avoid violating the Establishment Clause. The Court's holding that the Establishment Clause would not be violated by grants subsidizing religious speech removed this rationale, see id. at 2420-24, leaving the exclusion without managerial justification and hence vulnerable to characterization as viewpoint discrimination.

n98. I have sketched the outlines of such an analysis elsewhere. See Post, supra note 83, at 317-25.

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B. Rust v. Sullivan: Subsidized Speech and the Boundaries of Managerial Domains

Instead I shall turn to the more fundamental issue of the principles that ought to inform First Amendment decisions to assign subsidized speech to managerial domains. These principles are of fundamental importance because First Amendment standards applicable to such domains differ so dramatically from those governing public discourse. I shall use as the focus of my inquiry the "extraordinary - some would say shocking - decision" n99 of Rust v. Sullivan. n100

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n99. Fitzpatrick, supra note 7, at 185.

n100. 500 U.S. 173 (1991).

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Rust was certainly a controversial decision. It sparked hostile hearings in the United States Senate, n101 fiercely negative public attention, n102 and sharply critical academic commentary. n103 It involved a challenge to regulations issued in 1988 by the Department of Health and Human Services (HHS) to implement Title X of the Public Health Service Act. The Act authorized HHS to subsidize family planning clinics, but it stated that ""none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.'" n104 The regulations prohibited Title X clinics and their employees from providing ""counseling concerning the use of abortion as a method of family planning or providing referral for abortion as a method of family planning.'" n105 They also prohibited Title X clinics and their employees "from engaging in activities that "encourage, promote or advocate abortion as a method of family planning.'" n106

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n101. See Hearings, supra note 40.

n102. See Cole, supra note 7, at 684 n.34.

n103. For a sample of academic commentary critical of the Rust decision, see Smolla, supra note 7, at 218-19; Cole, supra note 7; Phillip J. Cooper, Rusty Pipes: The Rust Decision and the Supreme Court's Free Flow Theory of the First Amendment, 6 Notre Dame J.L. Ethics & Pub. Pol'y 359 (1992); Fitzpatrick, supra note 7; Stanley Ingber, Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue, 46 Rutgers L. Rev. 1473, 1579-1612 (1994); Ronald J. Krotoszynski, Jr., Brind & Rust v. Sullivan: Free Speech and the Limits of a Written Constitution, 22 Fla. St. U. L. Rev. 1 (1994); Thomas Wm. Mayo, Abortion and Speech: A Comment, 46 SMU L. Rev. 309 (1992); Dorothy E. Roberts, Rust v. Sullivan and the Control of Knowledge, 61 Geo. Wash. L. Rev. 587 (1993); Peter M. Shane, The Rust That Corrodes: State Action, Free Speech, and Responsibility, 52 La. L. Rev. 1585 (1992); Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey, 95 Colum. L. Rev. 1724 (1995); Loye M. Barton, Note, The Policy Against Federal Funding for Abortions Extends into the Realm of Free Speech After Rust v. Sullivan, 19 Pepp. L. Rev. 637 (1992); Ann Brewster Weeks, Note, The Pregnant Silence: Rust v. Sullivan, Abortion Rights, and Publicly Funded Speech, 70 N.C. L. Rev. 1623 (1992). But see William W. Van Alstyne, Second Thoughts on Rust v. Sullivan and the First Amendment, 9 Const. Commentary 5 (1992).

n104. Rust, 500 U.S. at 178 (quoting 42 U.S.C. 300a-6 (1991)).

n105. Id. at 179 (quoting Grants for Family Planning Services, 42 C.F.R. 59.8(a)(1) (1989)).

n106. Id. at 180 (quoting Grants for Family Planning Services, 42 C.F.R. 59.10(a) (1989)). The regulations were suspended at the direction of President Bill Clinton in 1993. Clinton observed that the regulations "endanger[ ] women's lives and health by preventing them from receiving complete and accurate medical information and interfere[ ] with the doctor-patient relationship by prohibiting information that medical professionals are otherwise ethically and legally required to provide to their patients." William J. Clinton, President's Memorandum on the Title X "Gag Rule," 1993 Pub. Papers 10 (Jan. 22, 1993).

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The regulations were attacked under the unconstitutional conditions doctrine, because "they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling." n107 But the Court, citing League of Women Voters and Regan, defended the regulations on the grounds that "our "unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." n108

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n107. Rust, 500 U.S. at 196.

n108. Id. at 197.

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The Court's response to the plaintiffs' unconstitutional conditions argument is unconvincing. It would be unconstitutional for the government to condition access to the "subsidy" of second-class mailing privileges on the waiver of all advocacy of abortion within the mailed matter, even if magazines were free to advocate abortion outside "the scope of" the United States mail. Whether restrictions on subsidies apply only to funded speech or generically to recipients of the subsidies is thus not constitutionally determinative.

The Court could, however, have offered a more convincing response to the unconstitutional conditions argument. In both League of Women Voters and the hypothetical case of withdrawing second-class mailing privileges, the speech at issue can be characterized as public discourse. But it is highly questionable whether the speech of the Title X clinics and their employees could also be classified as public discourse. It is in fact superficially plausible to locate that speech instead within a managerial domain established by Title X.

There is much evidence that the Court in Rust was actually driven by the perception that the speech restricted by the HHS regulations should be located in a managerial domain. The Court repeatedly asserted that "the challenged regulations" do no more than "implement the statutory prohibition.... They are designed to ensure that the limits of the federal program are observed." n109 The argument, if fully articulated, would be that Congress enacted Title X to accomplish certain purposes, that these purposes are legitimate, and that the HHS regulations function within this managerial domain to regulate speech so as to achieve these purposes. The doctrine of unconstitutional conditions is powerless against this argument, because the doctrine lacks any mechanism for determining the domain to which speech should be allocated and hence for adequately describing the nature of the "rights" that are to be protected.

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n109. Id. at 193; see also id. at 195 n.4 ("The regulations are designed to ensure compliance with the prohibition of 1008 that none of the funds appropriated under Title X be used in a program where abortion is a method of family planning.").

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The argument, however, is flatly incompatible with the Court's own precedents that viewpoint discrimination is always and everywhere unconstitutional. The HHS regulations were plainly guilty of "impermissibly discriminating based on viewpoint because they prohibit "all discussion about abortion as a lawful option - including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy - while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.'" n110

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n110. Id. at 192 (quoting Brief for Petitioners at 11, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 89-1391)). This was also the basis of much criticism of Rust. See, e.g., Hearings, supra note 40, at 19 (statement of Lee C. Bollinger) ("It is one of the most deeply held principles of the First Amendment that the government not discriminate on the basis of viewpoint, and that is what the regulation at issue in Rust v. Sullivan does."); see also Weeks, supra note 103, at 1658-62 (condemning Rust for viewpoint discrimination).

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Faced with this awkward inconsistency, the Court simply blinked. It rejected the plaintiffs' charge of viewpoint discrimination on the grounds that:

This is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope. To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. n111

Nothing could more vividly illustrate the failure of the Court's purported prohibition on viewpoint discrimination than this passage. The HHS regulations plainly discriminate on the basis of viewpoint, if by viewpoint discrimination is meant, as Justice Kennedy meant in Rosenberger, to constrain speech on only one side of a disputed subject. n112 By upholding the HHS regulations, therefore, the Court essentially confessed to the irrelevance of the criterion of viewpoint discrimination within the context of managerial regimes. It instead subtly but significantly shifted the meaning of viewpoint discrimination along the lines that I suggested in our discussion of Rosenberger. n113 The Court in Rust in effect stated that regulations within managerial domains would not be deemed viewpoint discriminatory so long as they were necessary to accomplish legitimate managerial ends.

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n111. Rust, 500 U.S. at 194.

n112. See Cole, supra note 7, at 688 n.47; Wells, supra note 103, at 1730-32; Weeks, supra note 103, at 1661-62.

n113. See supra Section I.A.

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If the analysis I have so far offered is correct, therefore, Rust is an entirely defensible decision so long as it is assumed that the speech restricted by the HHS regulations is appropriately characterized as located within the boundaries of a managerial regime dedicated to the achievement of legitimate ends. But [*171] is this assumption well founded? Putting aside the

question of whether the ends of the HHS regulations are legitimate, n114 the question I wish to explore is whether the speech regulated in Rust ought in fact to be assigned to a managerial domain.

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n114. For arguments that they are not, see Redish & Kessler, supra note 7, at 576-77; Shane, supra note 103, at 1601-03. For the Court's argument to the contrary, see Rust, 500 U.S. at 192-93.

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Ultimately the allocation of speech to managerial domains is a question of normative characterization. What is at stake is whether we wish to consign speech to a social space where "the attainment of institutional ends is taken as an unquestioned priority." n115 This represents a serious contraction of our ordinary understanding of freedom of expression, and it therefore requires extraordinary justification. I have argued in detail elsewhere that such restrictions on speech can be justified only where those occupying the relevant social space actually inhabit roles that are defined by reference to an instrumental logic. n116

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n115. Post, supra note 80, at 1789 (footnote omitted). The argument of this and the following paragraph is fully developed in id. at 1788-809.

n116. See id.

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So, for example, persons in a government bureaucracy assume various institutional roles - secretaries, clerks, case workers, supervisors - all defined by reference to the organizational rationality of the domain. Similarly, persons within universities act the part of students or professors or graduate teaching assistants, by which they reveal their acquiescence in the instrumental logic of education. By contrast, the history of public forum doctrine can be read to illustrate how courts came to realize that the diversity of roles and expectations that persons actually bring to their use of government parks and streets precludes their subjection to state managerial authority. The same point can be made about the United States mail. Even though the Postal Service is clearly a government-owned and operated organization, persons have a "practical dependence... upon the postoffice [sic]," n117 so that they assimilate the mail to the rich and complex spectrum of roles and expectations that they inhabit in their everyday lives. Thus, while managerial authority over the Postal Service may be appropriate, that authority does not extend to members of the general public who use the mail, because, as Justice Holmes famously observed, "the use of the mails is almost as much a part of free speech as the right to use our tongues." n118

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n117. Leach v. Carlile, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting).

n118. United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

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We may ask, then, about the nature of the roles inhabited by persons regulated by the HHS regulations at issue in Rust. For the sake of simplicity, I shall examine only the core dyadic relationship of physician and patient that all sides take to be at the center of the case, and I will therefore consider the constitutionality of those aspects of the HHS regulations that prohibit [*172] physicians from offering advice or referrals about abortion in the course of their consultations with their patients, even when, in the medical judgment of the physician, it would be appropriate to do so.

Physicians are of course professionals, and it is well known that professionals do not fit well into the instrumental rationality of organizations. n119 This is fundamentally because professionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards. n120 "Professionals participate in two systems - the profession and the organization - and their dual membership places important restrictions on the organization's attempt to deploy them in a rational manner with respect to its own goals." n121

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n119. See Peter M. Blau & W. Richard Scott, Formal Organizations 62-63 (1962); see also Roy G. Francis & Robert C. Stone, Service and Procedure in Bureaucracy 154-56 (1956) (discussing competing principles of bureaucracy and professionalism).

n120. For a good discussion, see W. Richard Scott, Professionals in Bureaucracies - Areas of Conflict, in Professionalization 265-75 (Howard M. Vollmer & Donald L. Mills eds., 1966).

n121. Id. at 266.

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This point has been accepted by the Court in the context of lawyers. Thus, for example, the Court has held that although a public defender is employed by the state, the conduct of a public defender does not constitute state action because

a public defender is not amenable to administrative direction in the same sense as other employees of the State.... [A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer... a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." n122

Although the Court has found, in contrast, that the conduct of a prison physician does constitute state action, it has justified this holding on the explicit ground that a doctor's "professional and ethical obligation to make independent medical judgments [does] not set him in conflict with the State and other prison authorities." n123 This obligation to make independent medical judgments n124 sets limits to the managerial authority of a physician's [*173] employer, just as it does to the managerial authority of a lawyer's employer, because "[a] physician's professional ethics require that he have "free and complete exercise of his medical judgment and skill.'" n125 "If the employer were to control the independent judgment in the decisionmaking process and the performance of the professional's duties, the employer's control might conflict with the professional's primary and unequivocal duty to exercise his or her independent judgment." n126

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n122. Polk County v. Dodson, 454 U.S. 312, 321 (1981) (citations omitted) (quoting Model Code of Professional Responsibility DR 5-107(B) (1976)).

n123. West v. Atkins, 487 U.S. 42, 51 (1988).

n124. "Medical ethics as well as medical practice dictate independent judgment... on the part of the doctor." Paul D. Rheingold, Products Liability - The Ethical Drug Manufacturer's Liability, 18 Rutgers L.J. 947, 987 (1964); cf. Francis & Stone, supra note 119, at 156 (arguing that in professional mode of organization highly skilled professionals must be responsible for their decisions and able to perform on their own).

n125. Lurch v. United States, 719 F.2d 333, 337 (10th Cir. 1983) (quoting Principles of Medical Ethics 6, reprinted in American Med. Ass'n Judicial Council, Opinions and Reports 5 (1977)). The physician's duty to exercise independent judgment ultimately stems from the basic principle that "the patient's welfare and best interests must be the physician's main concern.... The physician's obligations to the patient remain unchanged even though the patient-physician relationship may be affected by the health care delivery system or the patient's state." American College of Physicians Ethics Manual (3d ed.), reprinted in 117 Annals Internal Med. 947, 948 (1992) [hereinafter Ethics Manual]; see also Council on Ethical and Judicial Affairs, Am. Med. Ass'n, Ethical Issues in Managed Care, 273 JAMA 330, 331 (1995) ("The foundation of the patient-physician relationship is the trust that physicians are dedicated first and foremost to serving the needs of their patients.").

n126. Quilico v. Kaplan, 749 F.2d 480, 484-85 (7th Cir. 1984); accord Ezekiel v. Michel, 66 F.3d 894, 902 (7th Cir. 1995) ("Each and every licensed physician... must fulfill his ethical obligations to exercise independent judgment when providing treatment and patient care...."); Lilly v. Fieldstone, 876 F.2d 857, 859 (10th Cir. 1989) ("It is uncontroverted that a physician must have discretion to care for a patient and may not surrender control over certain medical details."); Kelley v. Rossi, 481 N.E.2d 1340, 1343 (Mass. 1985) (affirming importance of physician discretion). Justice Holmes, with characteristic pith, stated the point in this way: "There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer." Pearl v. West End St. Ry., 176 Mass. 177, 179 (1900).

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It is far from clear, then, that physicians, even if they have accepted employment in Title X clinics, occupy roles defined by reference to a purely organizational logic, particularly in situations where that logic seeks to override the necessary exercise of independent professional judgment. And this is of course precisely what the HHS regulations attempted to do. n127

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n127. It is clear that there is a potential conflict between the HHS regulations and ethical medical practice. Doctors are under an "ethical duty to disclose relevant information about reproduction.... The physician does have a duty to assure that the patient is offered information on the full range of options...." Ethics Manual, supra note 125, at 950. "A pregnant woman should be fully informed in a balanced manner about all options, including raising the child herself, placing the child for adoption, and abortion.... The professional should make every effort to avoid introducing personal bias." American College of Obstetricians & Gynecologists (ACOG), Statement of Policy 2 (Jan. 1993); see ACOG, Standards for Obstetric-Gynecologic Services 61 (1989); ACOG, Statement of Policy: Further Ethical Considerations in Induced Abortion 3 (Dec. 1977); Council on Ethical and Judicial Affairs, Am. Med. Ass'n, Code of Medical Ethics: Current Opinions with Annotations 8.08 (1994) ("The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice.").

The Court's assertion that "the Title X program regulations do not significantly impinge upon the doctor-patient relationship," Rust v. Sullivan, 500 U.S. 173, 200 (1991), can properly be said to border on the "disingenuous." Cole, supra note 7, at 692; see Rust, 500 U.S. at 211 n.3 (Blackmun, J., dissenting). The Court supports its assertion on two grounds. It states, first, that the HHS regulations do not require "a doctor to represent as his own any opinion that he does not in fact hold." Rust, 500 U.S. at 200. While this may be true, the regulations do prevent doctors from offering information that may be medically relevant and necessary to disclose. The Court states, second, that the "doctor-patient relationship established by the Title X program [is not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." Id. This assertion, however, merely assumes what must be demonstrated, which is that the physician-patient relationship within a Title X clinic is so obviously subordinated to managerial imperatives that it no longer conforms to ordinary understandings of that relationship. Although such an alteration is certainly possible, it is also most unusual, and the Court offers no evidence to support its claim that it has occurred within Title X clinics. A modicum of social awareness would surely dictate a different conclusion. See Cole, supra note 7, at 692; Roberts, supra note 103, at 598-600.

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We would reach the same conclusion if the issue were analyzed from the perspective of the patient. The expectations of patients are symmetrical to those of physicians. In a world where physicians routinely exercise independent judgment, patients come to expect and rely upon that judgment. Those served by

Title X clinics adopt the role of patients and hence signal their expectation that they will receive competent and responsible professional service. Except in the most unusual of circumstances, patients expect the independent judgment of their physicians to trump inconsistent managerial demands.

If this analysis is correct, the Court in Rust lacked justification for its implicit decision to allocate medical counselling to the managerial domain of the Title X clinic. Neither the role of physician nor that of patient warrant any inference of acceptance of such a purely instrumental orientation. n128 For this reason, the viewpoint discrimination inherent in the HHS regulations cannot be justified by reference to managerial authority.

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n128. That is not to say, of course, that the government would be barred from creating special clinics in which all concerned were clear that what appeared at first blush to be "physicians" were actually merely state employees, fully subject to an administrative direction competent to override good and ethically required medical practice. The First Amendment would not constitutionally prohibit such a scheme. What the First Amendment forbids is the attempt to hire what all concerned understand to be physicians and then to attempt to regulate their speech as though they were merely employees.

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The matter is complicated, however, because the HHS regulations constrain private conversations between doctors and patients, and this speech is plainly not part of public discourse. It is therefore not self-evident that viewpoint discrimination is automatically forbidden. The matter can perhaps best be conceptualized as a regulation of professional speech. Sometimes such regulation is equivalent to the direction of professional practice. There is, for example, no constitutional difference between forbidding doctors from prescribing a certain drug and forbidding them from using it. In such a case, the First Amendment probably does not impose any distinctive constraints on the state's general power to regulate the practice of medicine. But the HHS regulations pose a different constitutional problem, for they are aimed specifically and explicitly at prohibiting the disclosure of information; they are not directed at medical practice. n129 There was never any question or possibility that doctors at Title X clinics would actually perform abortions. What the HHS regulations seek to interdict is the provision of facts about the possibility or availability of abortion as a family planning option.

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n129. I realize that this distinction is a matter of degree, because good medical practice often requires the provision of information. As used in this Essay, however, the distinction goes primarily to the justification for government regulation.

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The First Amendment is surely implicated whenever the state seeks to proscribe the flow of information qua information. n130 Although there is at present no well-developed doctrine setting forth the exact test to be used to

evaluate viewpoint discriminatory regulations of this type in the context of professional speech, n131 it would be fair to say that the First Amendment should at a minimum require that any such restriction have a substantial justification. The most obvious justification, and the only one actually articulated by the Court in Rust, is that the government wished to create family planning clinics that did not include abortion, and that the HHS regulations served this end. n132 But if my argument is correct that physician-patient relationships in Title X clinics are not subject to automatic managerial direction, this justification is constitutionally insufficient. The mere fact that the government has used subsidies to accomplish a purpose ought not to provide adequate constitutional grounds for the kind of restrictions at issue in Rust.

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n130. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 355-59 (1991); Wells, supra note 103, at 1764 ("If the First Amendment stands for anything, it stands for the principle that the government cannot "deliberately deny[ ] information to people for the purpose of influencing their behavior.'" (quoting Strauss, supra, at 355)); see also 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1507-08, 1510-14 (1996) (plurality opinion).

n131. See Paula Berg, Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice, 74 B.U. L. Rev. 201 (1994); Robert D. Goldstein, Reading Casey: Structuring the Woman's Decisionmaking Process, 4 Wm. & Mary Bill Rts. J. 787, 852-74 (1996).

n132. Nor did the government suggest any other justification for the Title X regulations. See Brief for Respondent, Rust v. Sullivan, 500 U.S. 173 (1991) (No. 89-1391).

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Viewpoint discriminatory regulations that prohibit the dissemination of information are ordinarily justified by a showing that the foreclosed information will lead to some harm that the government has a right to prevent. Thus if the government were to prohibit doctors subsidized by the Veterans Administration from discussing a certain drug, the constitutionality of the prohibition would normally turn on some showing that the drug was harmful and that the provision of information would increase the likelihood of harm. But this whole class of justifications seems unavailable to the government in Rust, because they would require that the government characterize abortion as a positive harm. The right to choose abortion is constitutionally protected, however, on the grounds that its exercise is "central to personal dignity and autonomy." n133 Surely the solecism of characterizing the exercise of such a right as a harm is both obvious and fatal. n134

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n133. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

n134. The Court in Rust repeatedly refers to Maher v. Roe, 432 U.S. 464 (1977), as standing for the proposition that the state can choose to subsidize

"services related to childbirth" but not "nontherapeutic abortions," because "the government may "make a value judgment favoring childbirth over abortion, and... implement that judgment by the allocation of public funds.'" Rust, 500 U.S. at 192-93 (quoting Maher, 432 U.S. at 474 (omission in original)). The argument in this Essay is not inconsistent with this proposition; it merely requires us to make the distinction between government decisions refusing to fund the medical practice of abortion, because childbirth is viewed as a positive good, and government decisions precluding the dissemination of information about abortion, because abortion is viewed as a positive harm. For an interesting discussion of abortion as a "vice," see Wells, supra note 103, at 1758-62.

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In fact, without purporting to do a complete analysis of the HHS regulations, I do not see how the regulations can be supported by any convincing justifications. My tentative conclusion would therefore be that the regulations ought to be found unconstitutional. The larger point I wish to stress, however, is that a proper analysis of the case requires a firm appreciation of both the power and limits of managerial domains within First Amendment jurisprudence. The fact that Rust involves subsidized speech is largely secondary.

III. First Amendment Characterizations of Government Action

There is an important and controversial class of cases in which the fact of government subsidization is central to constitutional analysis. These cases do not turn on the assignment of speech to particular social domains, but depend instead on the characterization of government action. The essential question posed by these cases is whether conditions on government subsidies should be classified as regulations imposed upon persons, or whether they should instead be classified as internal directives guiding the conduct of state institutions. The topic is large and complex, and at best I will be able to offer only a few preliminary observations. These can most usefully be developed in the context of the specific issues raised by the recent controversy surrounding congressional restrictions on grants to artists offered by the National Endowment for the Arts (NEA). n135

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n135. For a sample of the literature discussing the NEA controversy, see Cole, supra note 7, at 739-43 (arguing that NEA funding restrictions undermine First Amendment); Elizabeth E. DeGrazia, In Search of Artistic Excellence: Structural Reform of the National Endowment for the Arts, 12 Cardozo Arts & Ent. L.J. 133 (1994) (suggesting structural reforms to grantmaking authority of NEA); Owen M. Fiss, State Activism and State Censorship, 100 Yale L.J. 2087 (1991) (analyzing exercise of state power in context of Mapplethorpe controversy and NEA); John E. Frohnmayer, Giving Offense, 29 Gonz. L. Rev. 1 (1993-94) (discussing NEA controversy); Jesse Helms, Tax-Paid Obscenity, 14 Nova L. Rev. 317 (1990) (same); Robert M. O'Neil, Artistic Freedom and Academic Freedom, Law & Contemp. Probs., Summer 1990, at 177 (criticizing NEA funding restrictions as violation of freedom of expression); Amy Sabrin, Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?, 102 Yale L.J.

1209 (1993) (analyzing meaning of "content" in context of NEA controversy); Lionel S. Sobel, First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist, 41 Vand. L. Rev. 517 (1988) (arguing that First Amendment imposes standards by which courts may evaluate constitutionality of government subsidies of cultural and artistic expression); Sunstein, supra note 32, at 610-15 (analyzing First Amendment implications of government funding of arts); MaryEllen Kresse, Comment, Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?, 39 Buff. L. Rev. 231 (1991) (analyzing Mapplethorpe controversy); George S. Nahitchevansky, Note, Free Speech and Government Funding: Does the Government Have to Fund What It Doesn't Like, 56 Brook. L. Rev. 213 (1990) (arguing that funding decisions should be accorded higher standard of review as their restrictive effect increases); cf. Alvara Ignacio Anillo, Note, The National Endowment for the Humanities: Control of Funding Versus Academic Freedom, 45 Vand. L. Rev. 455 (1992) (discussing similar issues surrounding National Endowment for the Humanities grants to scholars).

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A. The NEA Controversy: Constitutional Characterizations of Funding Criteria

Congress created the NEA in 1965 "to develop and promote a broadly conceived national policy of support for the... arts in the United States." n136 The NEA is authorized to award grants to "individuals of exceptional talent engaged in or concerned with the arts." n137 By statute, applications for grants must be submitted "in accordance with regulations issued and procedures established" by the NEA Chair. n138 Although the NEA attempted to insulate these procedures "from partisan political considerations" n139 by ceding de facto authority to "panels of experts, usually peers of the applicant consisting of museum professionals or artists involved in the same discipline," n140 the work of artists subsidized by the NEA came under severe ideological attack in the late 1980s. n141

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n136. 20 U.S.C. 953(b) (1994).

n137. Id. 954(c).

n138. Id. 954(d).

n139. Note, Standards for Federal Funding of the Arts: Free Expression and Political Control, 103 Harv. L. Rev. 1969, 1972 (1990).

n140. Fiss, supra note 135, at 2094. For a good description, see DeGrazia, supra note 135, at 139-41.

n141. In 1989, Congress passed a temporary restriction on grants funded during fiscal year 1990, providing that grants could not be extended to support work "which in the judgment of the National Endowment for the Arts... may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in

sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value." Act of Oct. 23, 1989, Pub. L. No. 101-121, 304(a), 103 Stat. 701, 741 (1990). The certification procedure used by the NEA to enforce the restrictions of this section was declared unconstitutional in Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774 (C.D. Cal. 1991).

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The upshot was that Congress eventually qualified the NEA's granting authority, providing that "artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." n142 In 1992 this qualification was challenged by four individual performance artists, as well as by the National Association of Artists' Organizations. In Finley v. NEA, n143 a federal district court declared the ""decency' clause... void for vagueness under the Fifth Amendment and... overbroad under the First Amendment." n144

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n142. 20 U.S.C. 954(d)(1) (1994). The statute also declared that "obscenity is without artistic merit, is not protected speech, and shall not be funded." Id. 954(d)(2). For a good history of these events, see John H. Garvey, Black and White Images, Law & Contemp. Probs., Autumn 1993, at 189 (1993). In this Essay I do not examine the restrictions on NEA granting authority imposed by 954(d)(2).

n143. 795 F. Supp. 1457 (C.D. Cal. 1992). An appeal of Finley is still pending.

n144. Id. at 1476.

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The constitutional issues posed by Finley contrast neatly with those presented by League of Women Voters. The decisive question in League of Women Voters was whether the editorials of noncommercial broadcasters should be characterized as public discourse. Once this question was answered [*178] affirmatively, it was relatively unproblematic to characterize section 399's prohibition as directly restricting public discourse. In Finley, however, the artistic work supported by NEA grants may for the most part unproblematically be regarded as part of public discourse. n145 But by contrast it is not at all clear whether the decency clause struck down by Finley should be understood as a direct regulation of the speech of NEA grantees, or instead as a rule directed at the internal operation of the NEA. n146 Unlike League of Women Voters, therefore, Finley poses the question of how to characterize government action.

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n145. See Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338, 2345 (1995); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989).

n146. To paraphrase Laurence Tribe, it is not clear whether the decency clause is an instance of the government's adding its own voice or whether it is an example of the state's silencing the voices of others. See Tribe, supra

note 24, at 807.

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An analogous ambiguity of characterization would arise if, for example, Congress were to enact a statute prohibiting "indecent" magazines from receiving the subsidy of second-class mailing privileges. Accepting as uncontroversial premises that the Postal Service is an organization subject to direction by Congress, that those using the mail must comply with postal regulations, and that magazines flowing through the mail are public discourse, we must nevertheless face the question of how the ban on indecent magazines should be characterized: as a regulation of public discourse or as a rule directed at the internal operation of the Post Office.

The question exposes an unexplored assumption in the way in which I have so far presented the relationship between public discourse and managerial domains. I have spoken as if one could draw a sharp distinction between the state and its citizens, as though the realm of democratic self-determination functioned in isolation from systems of government intervention and support. But of course this is not the case under contemporary conditions; instrumental organizations of government presently infiltrate almost all aspects of social life. Organizational theorists have long recognized that institutional boundaries are open and porous. "The organization is the total set of interstructured activities in which it is engaged at any one time and over which it has discretion to initiate, maintain, or end behaviors.... The organization ends where its discretion ends and another's begins." n147 For this reason one can always ask whether the internal rules of a state organization should constitutionally be categorized as equivalent to the regulation of ambient domains of social life.

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n147. Jeffrey Pfeffer & Gerald R. Salancik, The External Control of Organizations 32 (1978).

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We would almost certainly view a statute barring indecent magazines from second-class mailing subsidies as a direct regulation of public discourse rather than as an internal guideline of the Post Office. To appropriate the vocabulary of Meir Dan-Cohen, we would classify it as a "conduct rule" for the [*179] government of citizens, rather than as a "decision rule" for the internal direction of government officials. n148 I strongly suspect that our reason for doing so is that magazines are so completely dependent on the operation of the mail that the statute would as a practical matter function to disable magazines branded as indecent. n149 In such a case we might even go so far as to agree with Owen Fiss's observation that "the effect of a denial" of a subsidy "is roughly equivalent to that of a criminal prosecution." n150

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n148. See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625 (1984). Kathleen Sullivan uses the vocabulary of "sovereign regulator" and "private art patron" to capture this distinction. See Kathleen M. Sullivan, Artistic Freedom, Public Funding, and

the Constitution, in Public Money and the Muse: Essays on Government Funding for the Arts 80, 82 (Stephen Benedict ed., 1991).

n149. Cf. Milton C. Cummings, Jr., To Change a Nation's Cultural Policy: The Kennedy Administration and the Arts in the United States, 1961-1963, in Public Policy and the Arts 141, 141 (Kevin V. Mulcahy & C. Richard Swaim eds., 1982) (claiming that second-class postal rate was "profoundly important for" and "a major cause of" growth of American magazines).

n150. Fiss, supra note 135, at 2097.

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But this equivalence, if it exists, is practical, not theoretical. It derives from the particular way in which subsidies for second-class mailing privileges have infiltrated their social environment. We can easily imagine counterexamples. Consider, for instance, the Kennedy Center, which the federal government subsidizes to "present classical and contemporary music, opera, drama, dance, and other performing arts." n151 These criteria for the allocation of subsidies exclude political and academic speech. Such speech is of course public discourse, yet its dependence upon the Center is so slight that we would not be tempted to read the effects of the government's exclusions as "roughly equivalent to that of a criminal prosecution." We would interpret the exclusions instead as decision rules for the internal direction of the Center's administrators. The exclusions would be constitutionally characterized as instrumental regulations confined to a managerial domain, rather than as general regulations of public discourse. n152

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n151. 20 U.S.C. 76j (1994); see Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 238 (1987) (Scalia, J., dissenting).

n152. This would be true even if the restrictions would in a particular case have the effect of making "work unavailable to the general... public." Fiss, supra note 135, at 2097. The decisive question would be the effect of the restrictions on the relevant aspects of public discourse, not on particular speakers.

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Cases of subsidized speech thus typically raise two independent issues of constitutional characterization. The first refers to the characterization of speech, and it requires us to determine whether subsidized speech is within public discourse or whether it is within some other constitutional domain. The second refers to the characterization of government action, and it requires us to determine whether standards allocating state subsidies should be regarded as conduct rules or as decision rules.

The characterization of government action entails judgments that are contextual and multidimensional. The nature of the action is certainly one factor to be considered. It matters whether a government allocation rule [*180] actually forbids behavior (like section 399 in League of Women Voters) or whether it simply constrains the provision of a subsidy (like the statute establishing the Kennedy Center). The former appears far more analogous to the

regulation of conduct than the latter. Also relevant are the many considerations identified in the rich academic discussion of unconstitutional conditions doctrine. Seth Kreimer's herculean efforts to assess the allocation of government benefits by reference to the triple baselines of "history," "equality," and "prediction" strike me as indispensable. n153 Kreimer's baselines reveal, for example, how subsidies can come to be experienced like entitlements because they have become so integrated into the fabric of everyday life. The case of the traditional public forum illustrates how we tend to characterize standards allocating such "entitlements" as conduct rules. n154 Kathleen Sullivan's magisterial explication of the ways in which the allocation of government benefits "determine the overall distribution of power between government and rightholders generally" n155 is equally indispensable. Sullivan's work underscores situations in which public discourse has become practically dependent upon government organizations. Thus the symbiotic connection of magazine publications to second-class mailing subsidies helps to explain why we tend to characterize the allocation of such subsidies as direct regulations of public discourse.

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n153. Kreimer, supra note 30, at 1351-74.

n154. See id. at 1359-63.

n155. Sullivan, supra note 25, at 1490.

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B. The Constitutional Distinction Between Conduct Rules and Decision Rules

We must decide, therefore, how the NEA "decency clause" should be characterized: as a conduct rule directly regulating public discourse or instead as a decision rule directing NEA officials to intervene in public discourse to achieve a distinct objective. It is noteworthy that the court in Finley does not explore this question. It instead merely assumes that because artistic expression is part of public discourse, the decency clause ought to be regarded as equivalent to the regulation of public discourse. The court characterizes the clause as an attempt "to suppress speech that is offensive to some in society." n156 Finley therefore uses standard First Amendment doctrines prohibiting vagueness and overbreadth to conclude that the clause is unconstitutional. The conclusion is indeed unobjectionable on the assumption that these doctrines are appropriately applied, but this assumption would not [*181] be correct if the decency clause were to be categorized as a decision rule for the guidance of NEA decisionmakers.

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n156. Finley v. NEA, 795 F. Supp. 1457, 1475 (N.D. Cal. 1992). For a similar perspective on the restrictions on NEA grants imposed by the Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 304(a), 103 Stat. 701, 741 (1989), see Carl F. Stychin, Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts, 12 Cardozo Arts & Ent. L.J. 79, 128-31 (1994).

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The doctrine of vagueness, for example, is not ordinarily enforced in the context of decision rules, for "the rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers." n157 This can be seen most dramatically in the context of the FCC, which is authorized by statute to grant, review, and modify licenses subject to the highly indeterminate standard of "public convenience, interest, or necessity." n158 It would surely be strange to hold that a "decency" standard is unconstitutionally vague, but that a "public interest" standard is not.

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n157. Mahler v. Eby, 264 U.S. 32, 41 (1924). For a good discussion of the vagueness doctrine in the context of decision rules, see Edward L. Rubin, Law and Legislation in the Administrative State, 89 Colum. L. Rev. 369, 397-408 (1989).

n158. 47 U.S.C. 307(a) (1994). For the Supreme Court's unsympathetic response to the charge that the standard is unconstitutionally vague, see NBC v. United States, 319 U.S. 190, 225-26 (1943); FCC v. Pottsville Broad. Co., 309 U.S. 134, 137-38 (1940); see also Red Lion Broad. Co. v. FCC, 395 U.S. 367, 379-80 (1969) (discussing statutory authority of FCC to promulgate regulations).

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The Finley court's appeal to overbreadth theory would be similarly problematic if the decency clause were to be regarded as a decision rule. Finley correctly cites precedents standing for the proposition that conduct rules designed to censor indecent public discourse should be struck down as unconstitutionally overbroad. n159 These precedents, however, do not control with regard to decision rules that administer managerial domains. We know, for example, that within managerial domains, the Supreme Court has specifically upheld the proscription of "indecent" speech where it has deemed such regulation necessary for the accomplishment of legitimate purposes. The inculcation of "the habits and manners of civility" within a high school has been held to constitute one such purpose. n160 If the NEA decency clause is seen as a decision rule, the precise constitutional question posed, therefore, is whether the government can organize itself in order to intervene in public discourse so as to promote the value of decency. This is a difficult question that must be directly and substantively analyzed; it cannot be settled by offhand references to overbreadth.

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n159. See Finley, 795 F. Supp. at 1475-76.

n160. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

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This analysis suggests that significant constitutional consequences follow from the classification of the NEA decency clause as a conduct rule or as a decision rule. To conceptualize the clause as a conduct rule regulating public discourse is to subject it to the usual First Amendment standards restricting

such regulations. What is striking, however, is that these standards would render unconstitutional not merely the clause itself, but also the larger criterion of "artistic excellence." It would be flatly unconstitutional for the state to regulate public discourse in a way that penalizes art deemed insufficiently [*182] excellent. n161 Imagine, for example, a congressional statute that seeks to improve public culture by excluding from second-class mailing subsidies magazines with short stories deemed by the Postal Service inadequate when measured by a standard of "artistic excellence."

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n161. A central principle of First Amendment jurisprudence is that public discourse cannot be regulated in ways that censor speech to enforce community standards. See Post, supra note 9, at 134-96. It is because of this principle that a conduct rule imposing a "decency" standard would be found unconstitutional. But this principle would also require that a conduct rule imposing an "excellence" standard be found unconstitutional.

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The most general statement of this point is that regulations of public discourse must meet stringent criteria of neutrality to ensure that public discourse is not subordinated to community values, and NEA grant criteria would be no exception. To conceptualize the criteria as regulations of public discourse would therefore probably impose upon the NEA the obligation to "parcel out its limited budget on a purely content-neutral, first-come-first-served basis as governments must do in allocating use of a public forum." n162 Such an obligation would create powerful disincentives for the investment of government support, because that support could no longer be oriented toward the advancement of specific values. n163

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n162. Finley, 795 F. Supp. at 1475; see Yudof, supra note 35, at 234-35. The Court in Finley ineffectually tries to escape this conclusion by analogizing "funding for the arts to funding of public universities." Finley, 795 F. Supp. at 1475. The court reasoned that:

In both settings, limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable.... Hiring and promotion decisions based on professional evaluations of academic merit are permissible in a public university setting, but decisions based on vague criteria or intended to suppress unpopular expression are not. Analogously, professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of "decency" are not.

Id. (citations omitted). Even if we put to one side the court's strange notion that a criterion of "decency" is "wholly subjective" in ways that a criterion of "artistic excellence" is not, the court's attempt to equate the NEA with a public university is fundamentally incompatible with its desire to characterize and assess the decency clause as a conduct rule addressed to public discourse. This is because public universities are managerial domains

dedicated to the purpose of education, see supra Section I.A, which is why universities may regulate speech in a "content-based" manner designed to accomplish heuristic purposes.

n163. See Yudof, supra note 35, at 242-43. In light of this conclusion it is fascinating to note that with respect to both public fora and the United States mail, where allocation rules for government subsidies are unproblematically characterized as conduct rules, it is neither practically nor politically feasible for the government to withdraw its subsidies.

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First Amendment analysis would follow a very different trajectory, however, if we were to classify the NEA decency clause as a decision rule, which is to say as an internal policy guideline directing the NEA to intervene into public discourse to encourage and facilitate excellent art that is also decent. n164 The state may participate in public discourse to accomplish purposes that the First Amendment forbids the state from seeking to [*183] accomplish directly by regulating public discourse. n165 Thus the government can operate the Kennedy Center to encourage "music, opera, drama, dance, and other performing arts," although it could not directly regulate public discourse to accomplish the same end. n166 Even if the state cannot directly regulate public discourse so as "to ensure that a wide variety of views reach the public," n167 the FCC can nevertheless constitutionally establish a managerial domain that includes broadcasters, and it can promulgate the fairness doctrine within that domain in order to serve the purpose of ensuring that "the public receive... suitable access to social, political, esthetic, moral, and other ideas and experiences." n168 Or, to bring the matter closer to the precise question that we are discussing, the state can surely intervene into public discourse to promote "excellent art," whether through the establishment of public orchestras or museums or through the provision of NEA grants, even if the government could not directly regulate public discourse to achieve that purpose.

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n164. Government efforts to intervene in public discourse can of course infringe upon many different constitutional provisions. Such efforts, for example, may violate the Establishment Clause or the Equal Protection Clause. They may be arbitrary and irrational and thus run afoul of the Constitution's hostility to "naked preferences." See Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984). In this Essay, I consider only those restrictions that would be specifically placed on the decency clause, viewed as a decision rule, by the freedom of speech provisions of the First Amendment.

n165. The Supreme Court has explicitly drawn an analogous conclusion in the area of the dormant Commerce Clause, holding that the government may aim at certain purposes when it acts as a "market participant" that are prohibited to it when acting as a "market regulator." See Reeves, Inc. v. Stake, 447 U.S. 429, 436-40 (1980).

n166. Thus a state which permitted "music, opera, drama, dance, and other performing arts" to be performed in a park that was a public forum could not simultaneously exclude academic or political speech.

n167. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247-48 (1974) (footnote omitted).

n168. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); see Metro Broad., Inc. v. FCC, 497 U.S. 547, 566 (1990) (endorsing FCC regulation aimed at increasing broadcast diversity), overruled in part by Adarand Constructors Co. v. Pena, 115 S. Ct. 2097, 2111 (1995).

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So long as the allocation criteria for state subsidies are conceptualized as decision rules addressed to the administrators of state organizations, they can be justified by reference to a far broader array of purposes than would be permissible if they were regarded as conduct rules regulating public discourse. n169 The basic reason for this asymmetry is that the state is prohibited from imposing any particular conception of collective identity when it regulates public discourse, n170 but the state must perforce exemplify a particular conception of collective identity when it acts on its own account. n171 Just as the President can speak out in favor of a particular vision of community values, n172 so can the government organize itself through institutions to support and nourish that vision.

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n169. A contrary conclusion would prohibit most constructive interventions by an activist state. See generally Cass R. Sunstein, Democracy and the Problem of Free Speech 230 (1993).

n170. See Post, supra note 17, at 1114-23.

n171. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510, 2519 (1995); Sanford Levinson, They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society, 70 Chi.-Kent L. Rev. 1079 (1995) (arguing that state inevitably supports public symbols that carry particular ideological messages).

n172. As Melville Nimmer once observed, "Surely there is something fundamentally wrong with a doctrine that would find presumptively illegitimate Theodore Roosevelt's view of the presidency as a "bully pulpit,' and Franklin Roosevelt's exercise of leadership via the "fireside chat.' Our government officials are properly expected to lead as well as to reflect public opinion." Melville B. Nimmer, Nimmer on Freedom of Speech, 4.09[D], at 4-96-97 (1984).

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The constitutional importance of empowering the state to express and sustain shared beliefs is what I believe Chief Justice Rehnquist sought to express in his often-cited observation in Regan that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." n173 Although Rehnquist's formulation is unfortunately overbroad and decontextualized, the core of his insight is that when the government is authorized to act in its own name as a representative of the community, its decision to promote one value cannot by itself carry an internal constitutional compulsion simultaneously to support other values. n174

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n173. Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983).

n174. See, e.g., Emerson, supra note 39, at 698 (recognizing necessity of government expression); Cole, supra note 7, at 702-03 (emphasizing importance of government freedom to control content of its speech); Donald W. Hawthorne, Subversive Subsidization: How NEA Art Funding Abridges Private Speech, 40 U. Kan. L. Rev. 437, 451 (1992) (recognizing government's nonneutral promotion of ideas); Redish & Kessler, supra note 7, at 560-62 (expressing importance of government's role as educator and communicator).

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It follows from this conclusion that viewpoint discrimination alone will never be a sufficient ground for striking down decision rules. n175 Whenever the state acts to support a particular conception of community identity, it will engage in viewpoint discrimination with respect to that conception. So, for example, if the NEA allocates grants to support artistic excellence, it must adopt a perspective about the meaning of that value; if the value is contested, the NEA's perspective will necessarily be viewpoint discriminatory from the standpoint of those who hold a different interpretation of the value. n176

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n175. Needless to say, traditional academic opinion is strongly to the contrary. See, e.g., Smolla, supra note 7, at 196 (characterizing straightforward viewpoint discrimination as constitutionally invalid); O'Neil, supra note 135, at 191 (same); Sobel, supra note 135, at 525 (same); Sullivan, supra note 148, at 89-90 (same); Sunstein, supra note 32, at 611-12 (same). But see Sunstein, supra note 169, at 231-32 (setting out permissible parameters of viewpoint discrimination).

n176. For a discussion of the viewpoint discriminatory aspects of current NEA funding criteria, see Price, supra note 66, at 184-86; Daniel Shapiro, Free Speech and Art Subsidies, 14 Law & Phil. 329, 346-53 (1995).

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C. First Amendment Limitations on Decision Rules

We now face something of a conundrum, however, for if decision rules that guide government interventions into public discourse can exemplify and advance particular community values, and if they can therefore discriminate on the basis of viewpoint, what general First Amendment limitations, if any, can be applied to them? The only plausible source for such limitations would lie in what I have elsewhere called the "collectivist" theory of the First Amendment, which was the basis of the Supreme Court's reasoning in Red Lion. n177 In that case the Supreme Court held that the constitutionality of the FCC's fairness doctrine should be assessed in terms of its consistency with "the ends and purposes of the First Amendment," which the Court defined in [*185] terms of the necessity to "preserve an uninhibited marketplace of ideas" and to ensure that the public "receive suitable access to social, political, esthetic, moral and other ideas and experiences." n178 Surely decision rules inconsistent with

these ends and purposes ought to be unconstitutional.

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n177. See Post, supra note 17, at 1114-23.

n178. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389-90 (1969).

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Red Lion, however, involved the regulatory authority of the state. At issue was the FCC's promulgation of rules restricting the expression of broadcasters, albeit that the broadcasters' speech was itself regarded as outside of public discourse. Even on the assumption that direct managerial regulation of expression should be unconstitutional if it unduly constricts the diversity and vigor of broadcasters' speech, n179 it is not apparent how this conclusion can be translated to the context of decision rules that do not directly regulate speech but instead serve as guidelines for government intervention into public discourse.

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n179. For example, an FCC rule prohibiting broadcasters from covering the Whitewater scandal would surely be unconstitutional because its purpose and effect would be to restrict the marketplace of ideas, even if broadcasters' speech is not regarded as part of public discourse.

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Consider, for example, the difficulty we would face in applying the Red Lion standard to the subsidies at issue in Finley. In contrast to regulation, subsidies create speech. By hypothesis each subsidy that is awarded increases the absolute quantity of public discourse. n180 How, then, could granting subsidies ever be construed as constricting expression? To apply Red Lion, therefore, we would have to interpret the collectivist theory as prohibiting not merely the outright reduction of speech, but also the distortion of public discourse. Subsidies that emphasize one perspective or another, one value or another, might be thought to skew public discourse, to deform artificially its natural diversity and spontaneous heterogeneity, and to be unconstitutional for these reasons.

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n180. Martin Redish and Daryl Kessler acutely observe that subsidies are sometimes provided on the condition that a recipient refrain from speaking in ways that the recipient would, in the absence of the subsidy, be free and able to do. They refer to this phenomenon as "negative subsidies" and convincingly argue that such subsidies should be regarded with constitutional suspicion. Redish & Kessler, supra note 7, at 558-59; see Smolla, supra note 7, at 189 (arguing that "the more lax constitutional treatment given to the government when it participates in the speech market should not be extended to the government when it is in fact engaged in market regulation, under the pretext of mere participation"). Chief Justice Rehnquist's discussion of the unconstitutional conditions doctrine in Rust is in fact an attempt to reduce the doctrine to a prohibition of negative subsidies. See Rust v. Sullivan, 500

U.S. 173, 197 (1991); supra text accompanying notes 108-11.

In the vocabulary that I have proposed in this Essay, we can conceptualize negative subsidies as an effort to leverage decision rules into conduct rules, and we can conclude that they should therefore be evaluated according to the standards appropriate to conduct rules. The Court has imposed similar limitations on a state's ability to leverage market participation into market regulation in the context of the dormant Commerce Clause. For a review of these cases, see South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 94-99 (1984).

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The problem with this line of analysis, however, is that it is not obvious how to give useful content to the concept of "distortion" once it is accepted that the government may allocate grants to support particular values. Every [*186] government intervention in public discourse will change the nature of that discourse. If the state gives prize money to fund a competition for the best essay on environmental protection rather than on geography, or if it supports research on the history of America rather than on that of ancient Macedonia, or if it issues grants to excellent art, or to local art, or to performance art, it will have had both the purpose and effect of influencing the shape of public discourse. Such influence is the necessary consequence of abandoning the standards of content and viewpoint neutrality that we ordinarily impose on state regulations of public discourse.

We could attempt to circumvent this difficulty by arguing that while some kinds of distortion of public discourse are inevitable and tolerable, other kinds are not. Imagine, for example, if Congress were to enact a statute requiring the NEA to distribute grants only to art supportive of the party in control of Congress. Our immediate and strong intuition is that such a statute should be struck down as unconstitutional. Surely this intuition indicates that there are limits to the kinds of distortion that we would be willing to accept.

The constitutional grounds of this intuition, however, are somewhat puzzling. The intuition cannot rest merely on the fact that the goal and effect of the statute is to shape the content of public discourse, because uncontroversial allocation criteria also have these characteristics. NEA grants distributed on the basis of artistic excellence have exactly the purpose and effect of shaping the content of public discourse. Nor can the intuition rest on the notion that government action seeking to reaffirm the political status quo is presumptively unconstitutional, for the speech of government officials often has precisely this purpose, particularly during reelection campaigns.

Perhaps, then, our intuition rests on some ground of difference between government speech and government grants to private persons. The grounds for distributing the latter, we might say, must be reasonable, by which we mean that they must be justifiable by reference to some common value. Grants to achieve artistic excellence are reasonable because as a culture we share commitments to the worth of artistic merit. Grants to support research in history or to support the performance of opera are rational because we recognize and accept the value of these endeavors.

But what value would underwrite our hypothetical statute? It may advance the interests of the party in power to receive federally funded artistic support, but that is not a shared value. We value instead the fairness of the political

process as a whole, which we sharply distinguish from the particular interests or preferences of specific parties who participate in that process. We may even go further and observe that awarding grants to art supportive of the political party in power would impair the fundamental fairness of the political process. Such grants might be thought analogous to purchasing votes.

These conclusions suggest that our intuition about the unconstitutionality of the hypothetical statute does not stem from any generic commitment to the [*187] vigor and diversity of public discourse, as in the collectivist theory articulated in Red Lion, but rather from specific views about the distinct realm of partisan politics. n181 No doubt this realm embraces far more than simple contretemps between Republicans and Democrats; its boundaries may even include disputes that are (so to speak) foregrounded or framed for decision by an electorate or legislature. n182 We would certainly wish to place definite constitutional limitations on the power of government to dispense subsidies to intervene in such disputes, and we would probably express those limitations in terms of the distinction between preferences and values, and in terms of specifically political norms of fundamental fairness.

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n181. See Sunstein, supra note 169, at 231-32; Shiffrin, supra note 4, at 612-17, 622-32; Steven Shiffrin, Government Speech and the Falsification of Consent, 96 Harv. L. Rev. 1745, 1750-51 (1983) (reviewing Yudof, supra note 35).

n182. For an interesting case study on the proper scope of official lobbying for public referenda, see Burt v. Blumenauer, 699 P.2d 168 (Or. 1985).

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We can test this analysis by imagining a congressionally authorized prize to be awarded annually to the best "patriotic" work of art. Whatever we may ultimately conclude about the legitimacy of such a prize, it is fair to say that we would not strongly and immediately intuit that it should be unconstitutional. A decision rule allocating government subsidies to patriotic art, even though supportive of the political status quo, is in every material respect analogous to a decision rule allocating government subsidies to excellent art. Both artistic excellence and patriotism transcend the specifically political, because neither can be said to be disputable in a manner framed for decision; both embody shared values, not preferences; and neither would violate fundamental norms of political fairness. If the NEA decency clause were measured by these standards, I suspect that it would easily pass muster. Decency is not a matter of partisan politics. It is a shared value, not a preference. And the value of decency is not only consistent with fundamental norms of political fairness, it is in some respects presupposed by public discourse itself. n183

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n183. For further discussion of the preconditions of public discourse, see Post, supra note 9, at 135-48.

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We can learn from our examination of the hypothetical statute, then, that there are discrete pockets of constitutional concern that establish limits to

the decision rules that may be used to allocate government subsidies. This is useful to know, and if we were to engage in a thorough canvass of the subject we would wish to search out these pockets and identify them. But this insight does not advance our effort to derive a general standard from the collectivist theory of Red Lion that will enable us to assess the constitutionality of specific decision rules.

The most significant and sustained effort to accomplish this task is by Owen Fiss in his recent book The Irony of Free Speech. n184 Fiss proposes a [*188] constitutional standard that would prohibit decision rules allocating government subsidies "in such a way as to impoverish public debate by systematically disfavoring views the public needs for self-governance." n185 The question, of course, is how such unconstitutional decision rules can be identified, and to his credit, Fiss directly confronts this issue. In doing so, however, he is drawn in two incompatible directions, so that his analysis ultimately offers a lesson quite different from that which he intends.

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n184. Owen Fiss, The Irony of Free Speech (1996).

n185. Id. at 42.

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In certain moods Fiss embraces an ideal of government neutrality, which he strives to realize by proposing criteria for assessing managerial purposes that are defined in purely procedural terms. n186 He argues that the state ought to fund private speech based on its "relative degree of exclusion.... Arguably, all unorthodox ideas have claim under the First Amendment to public funding, but perhaps those most unavailable to the public have the greatest claim." n187 Fiss also contends that "financial need" ought to be an additional factor for constitutional consideration. n188

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n186. See id. at 42-43. As Fiss notes:

The ideal of neutrality in the speech context not only requires that the state refrain from choosing among viewpoints, but also that it not structure public discourse in such a way as to favor one viewpoint over another. The state must act as a high-minded parliamentiarian, making certain that all viewpoints are fully and fairly heard.

Fiss, supra note 135, at 2100.

n187. Fiss, supra note 184, at 44.

n188. Id.

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The attraction of these procedural criteria is that they are content neutral. They depend upon an implicit egalitarian norm that would promote (something like) equal access for all ideas, and that would thus give extra assistance to ideas that are excluded because of their obscurity or lack of financial support. The source of this norm lies within the equal protection jurisprudence of which Fiss is an acknowledged master. n189 But that jurisprudence carries within it certain important assumptions. It presumes, for example, that the norm of equality is to be applied to units - like individuals or groups - that are finite in number. It also presumes that there is a metric of equality, whether it be "educational opportunity" or "dignity," with respect to which each of these units should be regarded as the equal of every other.

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n189. Fiss refers specifically to this jurisprudence: "Just as some minority groups may be more disadvantaged than others, some unorthodox ideas may be more hidden from public view than others." Id. On the general tendency to import Equal Protection norms into First Amendment analysis, see Post, supra note 6, at 1267-70.

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These assumptions, however, are inapplicable in the context of ideas. The number of potential ideas is infinite, not finite. This implies that a principle aspiring to provide equal access to all ideas is impossible either to conceive or to apply. Moreover, there is no common metric - whether it be called "opportunity for public discussion" or "intrinsic worth" - with respect to which each of these infinite ideas should be regarded as equal to every other. Many [*189] ideas that are "unavailable" for public consideration are excluded because they are long dead or decisively repudiated. No one would now take seriously ideas of human sacrifice, or phlogiston, or the droit du seigneur, and so forth, ad infinitum. When the government creates decision rules to allocate subsidies for speech, it need not and should not be under a constitutional obligation to resuscitate and subsidize each of these ideas merely because they are without financial support, excluded, or otherwise "unavailable to the public."

Meiklejohn was therefore quite incorrect to claim that there is an "equality of status in the field of ideas." n190 There is instead a constitutional equality of status among persons who propound ideas. n191 Because we believe in an equality of status among speakers, we do not permit the state to regulate public discourse so as to favor the contributions of some persons more than others, even if the state believes that the ideas of some are worthier of public attention or space on the public agenda. n192 But because we do not believe in an equality of status among ideas, we permit the government to advance and accentuate discrete and specific ideas when it itself speaks. n193

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n190. Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948).

n191. See Post, supra note 83, at 290-91.

n192. See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (invalidating state prohibition of policy-oriented speech on monthly bills of public utilities); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam) ("The concept that government may restrict the speech of some elements of our society in order to enhance the relative value of others is wholly foreign to the First Amendment ....").

n193. This objection would prove fatal even if Fiss's egalitarian criteria were interpreted to apply only to the ideas of persons participating within public discourse. Although the potential number of such ideas may not be infinite, Fiss could not defend this (modified) egalitarian thesis on the ground that a rich and full public debate requires subsidization of all views articulated within public discourse that happen to be underfinanced or generally unavailable. It could not plausibly be maintained that public debate would be richer if the views of Nazis or Stalinists were subsidized, even if such views were unorthodox, marginalized, and not commonly accepted. Surely it would be bizarre to contend that such views must be supported to ensure a better and more informed public dialogue. Nor could a modified egalitarian thesis be defended on the principle that the state ought to treat all persons within public discourse equally, as that principle would instead require the state to refrain from treating people differently, even if their ideas had different degrees of acceptance and exposure. The modified egalitarian thesis would therefore have to be justified by some variant of the notion that the First Amendment requires equality among ideas. But there is no particular reason to accept this proposed equality, and good reasons to reject it.

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Fiss is keenly aware of this difficulty, and he is consequently also drawn to content-based criteria for the constitutional assessment of decision rules for government subsidies. He believes that the First Amendment should require government officials affirmatively "to ensure the fullness and richness of public debate," n194 and hence to make decisions "analogous to the judgments made by the great teachers of the universities of this nation every day of the week as they structure discussion in their classes." n195 Fiss fully recognizes that to fulfill this goal would require "a sense of the public agenda, a grasp of [*190] the issues that are now before the public and what might plausibly be brought before it, and then an appraisal of the state of public discourse." n196

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n194. Fiss, supra note 184, at 41.

n195. Fiss, supra note 135, at 2101.

n196. Id.; see Fiss, supra note 184, at 44-45.

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Fiss's proposal to evaluate decision rules for their affirmative contribution to the fullness and richness of public debate is flatly inconsistent with his proposal to evaluate decision rules based upon viewpoint neutral criteria, like those underlying a mechanical egalitarianism. If the agenda of public discourse were fixed, one might (perhaps) imagine a viewpoint

neutral rule mandating ventilation of all sides of existing issues. But of course the agenda of public discourse is fiercely contested and controversial. Indeed, "political conflict is not like an intercollegiate debate in which the opponents agree in advance on the definition of the issues.... He who determines what politics is about runs the country, because the definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power." n197 To impose on government officials a constitutional duty to allocate subsidies based upon their sense of a proper public agenda is therefore to require them to adopt particular perspectives within intensely contested controversies.

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n197. E.E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America 68 (1st ed. 1960). As William H. Riker concisely observes: "Just what is a political issue is itself a political issue." Agenda Formation 3 (William H. Riker ed., 1993).

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This is not fatal, however, for we have already seen that decision rules are often and appropriately viewpoint-based. In fact, a constitutional standard mandating that decision rules for the allocation of subsidies be evaluated according to their effect on ensuring the quality of public discourse seems to me theoretically and constitutionally attractive. The only question that it raises, and it is not an insignificant question, is how such an affirmative standard could institutionally be applied by courts. Decisions to disburse subsidies are always made in the context of scarcity, and they are highly polycentric. n198 Subsidies can be granted according to a virtually infinite set of possible criteria. Even if a given set of criteria is accepted, there are innumerable potential grantees and limitless permutations by which funds may be distributed among any particular set of grantees.

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n198. See Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 393-405 (1978) (discussing concept of polycentric tasks and adjudication).

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In such circumstances Fiss's proposed standard could not plausibly function as a set of determinate restrictions on government action; it would instead have to be conceived as an aspirational goal toward which government officials should aim. From the perspective of a reviewing court, therefore, the standard would require judicial evaluation of whether the goal could have been better achieved through a different set of allocation rules. As this will always be the case, the adoption of Fiss's proposed standard would lead either to substantial judicial preemption of, or substantial judicial deference to, decision rules for allocating subsidies. [*191]

Given these choices, it is readily predictable that courts will choose the latter option. They would be right to do so, for judicial preemption of the allocation criteria for government subsidies would itself operate as a significant disincentive to government investment in subsidies. Imagine, for

example, what a court would actually do if the NEA budget were slashed to ten million dollars, and if Congress were to decide that the entire budget ought to be devoted to opera, or to museum outreach programs, or to innovative ballet companies, or to some combination of the three. No matter what selection Congress makes, it will always be possible for a court legitimately to reason that public discourse could have been made richer by a different choice. If courts were routinely to take advantage of this fact to alter congressional funding priorities for the NEA, it is unlikely that Congress would long continue to support the NEA.

Fiss seems to assume that, contrary to this analysis, he has created a standard that will operate as a determinate restriction on government decision rules. He writes that allocation criteria like "family values" would be facially unconstitutional because of their "pernicious effects on debate by simply reinforcing orthodoxy." n199 But Fiss's reasoning in these passages relies on the mechanical, content-neutral norm of egalitarianism which I have argued must be abandoned as both theoretically and practically inadequate. Once the viewpoint discrimination entailed by Fiss's affirmative standard is firmly assimilated, it is not at all clear how a court could decide that the criterion of "family values" should be set aside as obviously unconstitutional. If Congress were to conclude that public debate would be enriched if greater attention were to be paid to the commonly shared values of the nuclear family - for example, by funding art on "children of divorce" - a court would have neither more nor less grounds on which to disagree than if Congress were to decide that the NEA ought to devote its entire (reduced) budget to opera.

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n199. Fiss, supra note 184, at 37.

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The fact that family values are popular and commonly shared, or, in Fiss's demeaning term, "orthodox," would not be grounds for abandoning a posture of judicial deference because, as we have seen, these attributes are precisely what authenticate the government's support of family values as reasonable and legitimate. Allocation criteria that are idiosyncratic and without roots in a common culture would be vulnerable to the charge of arbitrariness. If a congressional statute were to mandate that the NEA award grants only to red-headed artists, a court might well move beyond deference to strike down the statute as irrational. But the court's ruling would actually depend upon its perception that the statute could not be justified by reference to shared and "orthodox" values.

These considerations suggest that even if Fiss's proposed affirmative standard were accepted - and I think that it should be - courts could not and [*192] should not use it to set aside decision rules for allocating subsidies except in extreme and marginal cases. n200 Subsidies that literally overwhelm public discourse, that seriously rupture foundational notions of a functioning marketplace of ideas, can and should be set aside. But these will, by definition, be highly exceptional circumstances. It is in fact most likely that courts will recognize such exceptional circumstances not by reference to the affirmative standard of a rich public discourse, but rather by the negative criterion that Mark Yudof long ago articulated, which identifies the fear that government decision rules will operate "to falsify consent" by fashioning "a

majority will through uncontrolled indoctrination activities." n201 But whichever way the problem is analyzed - whether from the perspective of a public discourse that is insufficiently rich or from one that is artificially narrow - the NEA decency clause does not appear to constitute the kind of rare and exceptional case that would or should be found unconstitutional. n202

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n200. Cf. Yudof, supra note 35, at 259 (judicial review of government supported speech appropriate primarily in "egregious" cases); Frederick Schauer, Is Government Speech a Problem?, 35 Stan. L. Rev. 373, 378 (1983) (reviewing Yudof, supra note 35).

n201. Yudof, supra note 35, at 15.

n202. Fiss does not in fact believe that the decency clause should be set aside as unconstitutional. See Fiss, supra note 184, at 38.

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D. The NEA Controversy Revisited: The Conflict Between Democratic Self-Governance and Community Self-Definition

It seems, then, that we are faced with the unpalatable choice of either placing the NEA in a constitutional straitjacket or else liberating it to engage in a wide range of content-based interventions - interventions that many of us may find both misguided and offensive. We do not appear to have the option of picking and choosing, of constitutionally constraining the NEA to decision rules that we happen to find amenable or of constitutionally empowering the NEA to promulgate conduct rules that we happen to find wise.

It is worth pausing for a moment to reflect upon why we must choose between these unattractive options. "The fault," as Shakespeare might have remarked, "is not in our stars, but in ourselves." n203 It is precisely because we wish to use the First Amendment to establish a realm of public discourse in which persons are regarded as autonomous and self-determining that we impose strict constitutional requirements of neutrality on state regulation of public discourse. And it is precisely because we wish our government to exemplify and to advance the particular norms of our community that we relax these requirements when the state is acting on its own account to support the nation's arts.

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n203. William Shakespeare, Julius Caesar act 1, sc. 2.

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We face, in other words, a conflict between two constitutional values: that of democratic self-governance and that of community self-definition. n204 It is the function of constitutional law systematically to describe the internal architecture of values like these, to embody that architecture in social space, to articulate its practical ramifications, and, in cases of conflict between values, to adjudicate their proper boundaries. n205 To characterize the

decency clause as a decision rule or as a conduct rule is, in effect, to fix the boundary between two constitutional values. n206

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n204. On the fundamental constitutional value of community self-definition, see Post, supra note 9, at 1-18, 51-88, 177-96.

n205. We are, of course, free to alter our constitutional commitments and to pursue different values, but, on pain of incoherence, frustration, and hypocrisy, we are not free to ignore the consequences of the values we have chosen.

n206. On the tension between these two values, viewed from the perspective of an increasingly international system of communication, see Price, supra note 66, at 233-46.

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Where we set that boundary will depend in part upon the manner in which the decency clause affects the production of art within the public discourse enveloping the NEA. We would be more likely to classify the clause as a conduct rule, and hence to subject it to the constraints of a constitutional regime of democratic self-governance, if we were to regard the clause as imposing community norms on public discourse. Conversely, we would be more likely to classify the clause as a decision rule - and hence to be constitutionally legitimized, if we were to view the clause as merely encouraging a shared and important community value.

A brief review of the evidence suggests an ambiguous picture. Unlike section 399 in League of Women Voters, the decency clause does not prohibit behavior; it merely regulates the availability of subsidies. Although the NEA is a relatively new organization, some artists may have begun to feel entitled to its subsidies; but this sense of entitlement does not seem to be shared by the general public. n207 Although the NEA is an important and influential player in the world of art production, the actual extent of this world's practical dependence on the NEA is uncertain. n208

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n207. For example, one commentator has observed:

The NEA is several years younger than Madonna. Still, early in its brief existence it achieved the status of entitlement for those who found themselves for the first time beneficiaries of federal largess, or, in most of their cases, smallness. The dollar amounts may be minuscule by comparison with others flung hither and yon by Uncle Sam... but the amount of indignation that can be mustered by those liable to lose these nickels and dimes is truly spectacular. Not merely spectacular, but it has more sniffles and sobs than "Camille."

Jonathan Yardley, NEA Funding: Dollars and Nonsense, Wash. Post, Jan. 23, 1995, at B2; see also Tim Miller, An Artist's Declaration of Independence to

Congress (July 4, 1990), in Culture Wars: Documents from the Recent Controversies in the Arts 244, 244-45 (Richard Bolton ed., 1992); Newt Gingrich, Cutting Cultural Funding: A Reply, Time, Aug. 21, 1995, at 70; Jeff Jacoby, Endowment of Arrogance, Baltimore Sun, Aug. 9, 1995, at 17A; John Frohnmayer's Final Act, Wash. Times, Feb. 24, 1992, at E2 (discussing Frohnmayer's resignation as NEA chairman).

n208. In 1995, the NEA's grant-making funds totaled approximately $ 138 million. See National Endowment for the Arts Office of Policy, Research, and Technology, Table Summarizing NEA Funding (Nov. 1995) (on file with the Yale Law Journal). In that same year, $ 265.6 million was appropriated through state art agencies, and an estimated $ 650 million was allocated by local governments. See Nina Kressner Cobb, President's Comm. on Arts & Humanities, Looking Ahead: Private Sector Giving to the Arts and the Humanities 5 (1995). Furthermore, foundation funding for the arts in 1992, the most recent year for which complete data are available, totaled approximately $ 1.36 billion. See id. Finally, according to one survey, corporate funding for the arts in 1994 totaled $ 875 million. See id. Figures for individual giving to the arts are not readily available, but simply extrapolating from these estimates of government, foundation and corporate donations, it is likely that NEA support for the arts is about 5% of total donations.

This estimate may understate the extent of NEA influence, because the NEA is the single largest donor to the arts and because NEA grants are often highly leveraged through requirements for matching funds. See id. at 18-20. The NEA's national prestige also creates independent leverage, so that, as the President's Committee on the Arts and Humanities stated: "The funding patterns demonstrate a complex national cultural structure in which private and public donor sectors reinforce each other, funding different pieces and parts, exercising different priorities within the whole.... The public and private sectors "operate in synergistic combination.'" Id. at 4.

It is also the case, however, that the estimate of 5% may strikingly overstate the extent of NEA influence because it does not account for income earned by artists and arts organizations directly through ticket sales, art purchases, and the like. We know, for example, that in disciplines like music, dance, and theater, earned income can account for between 50% and 60% of total revenues. See President's Committee on the Arts and Humanities, Chart Displaying Sources of Operating Income for Various Disciplines (1994) (on file with the Yale Law Journal). For an argument that "the pervasive role the NEA plays in the art world and the funding mechanisms on which artists and museums depend" gives to it "the ability to effectively silence artists who express disfavored views," see Hawthorne, supra note 174, at 438. For a contrary view, see Alice Goldfarb Marquis, Art Lessons: Learning From the Rise and Fall of Public Arts Funding 246-53 (1995).

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To this equivocal evidence must be added one further consideration: The constitutional consequences of characterizing the decency clause as a conduct rule are dramatically disabling. Such a characterization would impose on the NEA crippling requirements of content neutrality, requirements that would provide strong disincentives for congressional support. Because I set a high value on encouraging and empowering the government to establish institutions designed

to further norms like artistic excellence, I would myself lean toward giving ample scope to the value of community self-definition in the context of NEA subsidies, and I would therefore be quite cautious in characterizing the decency clause as a conduct rule.

It is not my intention, however, to press these preliminary observations toward definitive conclusions. My point is instead to stress that a full understanding of the legal dimensions of the NEA controversy will require a strong grasp of the importance and implications of the characterization of government action. Whether courts ultimately come to regard the NEA decency clause as a conduct rule or as a decision rule, their decision ought to be informed by a comprehension of the constitutional significance and consequences of this characterization.

IV. Conclusion

At the beginning of this Essay, I observed that the doctrines of unconstitutional conditions and viewpoint discrimination are incoherent because they are excessively abstract and formal, detached from the actual levers of decision. We can now summarize the jurisprudential causes of this observation. [*195] First Amendment rights of freedom of expression are methods of structuring legal interventions that define and enforce the consequences of constitutional values. Because these values are particular to specific social domains, so are First Amendment rights. n209 The doctrines of unconstitutional conditions and viewpoint discrimination, however, purport to apply universally, to control all aspects of social space. When courts are asked to employ the doctrines in situations where the doctrines do not correspond to relevant constitutional values, courts must deform and evade the doctrines, twisting them into ever more confused, arbitrary, and irrelevant shapes.

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n209. See Post, supra note 6.

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To rehabilitate First Amendment doctrine means to fashion it to address the actual values that move our constitutional decisionmaking. Even then doctrine may not compel specific outcomes in particular cases. What we have a right to expect from doctrine is that it force us to confront and to clarify the constitutional values that matter to us. My ambition in this Essay is to have articulated in cases of subsidized speech two doctrinal inquiries that seem to me useful in this way. The first involves the characterization of speech, and it requires us to determine the domain to which the subsidized speech at issue in a particular case should be assigned. We must decide whether to classify subsidized speech as within public discourse or as within some other domain like that of management or professional speech. As we locate subsidized speech in social space, so we identify the constitutional value that we attach to the speech and the concomitant set of constitutional constraints that we will apply to its regulation.

The second inquiry involves the characterization of government action, and it requires us to determine whether the standards allocating government

subsidies should be understood as regulations of subsidized speech or instead as internal directives to state officials dispensing subsidies. If we classify the standards as regulations, we shall subject them to the full array of constitutional constraints required by the domain in which the subsidized speech is located. But if we instead regard the standards as internal directives, we shall cede to the government a far freer hand in exemplifying and advancing national values.

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ESSAY: The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution

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SUMMARY:

... The Judicial Conference recognizes as the Benchmark Starting Date for clerkship interviews March 1 of the year preceding the year in which the clerkship begins. ... In order to understand why both judges and law schools should continue to support the March 1 Solution, we sketch the history of prior attempts to solve the law clerk hiring problem, all of which failed to achieve sufficient judicial support to provide lasting reform. ... As the interviewing season approached, Dean Calabresi suggested to the deans of other law schools that they ask their students not to apply and their faculty not to send letters of recommendation until at least three weeks before the March 1 date. ... Given the history of this process, law school clerkship advisers remained cautious and apprehensive, largely because they were not sure which judges would observe the March 1 benchmark. ... The imposition of short-leash offers is also unsporting toward other judges, particularly those geographically dispersed, who would also like to interview and perhaps make an offer to the applicant. ... The authors urge law school deans and faculty to act immediately to counter the conventional wisdom and to counsel students instanter that they are not obligated to accept, and should request a reasonable time to consider, an offer for a judicial clerkship. ...

TEXT:

[*207] I. INTRODUCTION

In September 1993 the Judicial Conference of the United States unanimously adopted the following resolution:

The Judicial Conference recognizes as the Benchmark Starting Date for clerkship interviews March 1 of the year preceding the year in which the clerkship begins. n1

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n1 Memorandum from Judge Becker and Chief Judge Breyer to Members of the Judicial Conference 1 (Sept. 8, 1993) (proposing specific language of resolution voted on by Conference) (on file with Judge Becker); see L. RALPH MECHAM (DIRECTOR), ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 49 (Sept. 20, 1993) ("In an effort to improve the law clerk hiring process, the Judicial Conference voted to recommend to all judicial officers that March 1 of the year before a clerkship begins be the benchmark starting date for law clerk interviews.").

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[*208] As submitted to the Judicial Conference, the resolution contained the following explanatory note:

The Benchmark Starting Date is not meant to be binding. The Conference expects that judges will make a good faith effort not to interview candidates before that date, but special circumstances might sometimes call for an earlier interview. This Benchmark Starting Date will be made known to the law schools, with the suggestion that faculties be urged not to transmit letters of recommendation until approximately February 1, which is about the time when third semester grades are available. The suggestion will also be made that law schools advise students that they are not obliged to accept the first offer tendered (there being widespread confusion on this point). n2

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n2 Memorandum from Judge Becker and Chief Judge Breyer to Members of the Judicial Conference 1 (Sept. 8, 1993) (on file with Judge Becker).

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This modest "March 1 Solution" followed years of failed attempts to deal with a process that had seen federal judges hiring law clerks as early as October of their second year of law school. Hiring clerks early on in their law school careers overemphasized first-year grades, caused unnecessary disruption of classes, considerably increased the cost of travel for interviews, vastly raised the anxiety level for the students, and impaired the reputation of the federal judiciary.

The competition among judges to hire prime law clerks tended to push hiring dates earlier and earlier. By 1992, law students scrambled as early as September of their third semester to apply to judges rumored to be hiring. In the fall of 1993, in an attempt to arrest the advancing trend, the Judicial

Conference adopted the March 1 Solution. After only one year in operation, it has been strongly endorsed by federal judges, law students, professors, and administrators. Although the Solution may not have been ideal in theory, in practice it was a success.

In order to understand why both judges and law schools should continue to support the March 1 Solution, we sketch the history of prior attempts to solve the law clerk hiring problem, all of which failed to achieve sufficient judicial support to provide lasting reform. We then examine why other approaches to the problem are inadequate and offer our recommendations for improving on the March 1 Solution.

II. A FEW PAGES OF HISTORY n3

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n3 "Upon this point a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).

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Before the mid-1970's, the prevailing practice of federal judges was to select law clerks during the fall of their third year of law school. Gradually, [*209] the judges' hiring date crept earlier and earlier until most selections were made in the spring of the students' second year. Since the late 1970's, federal judges have made six separate attempts to reform this process. n4

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n4 See Trenton N. Norris, The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes and Fruitful Reform, 81 CAL. L. REV. 765, 766, 785-88 (1993).

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In 1978, law school deans succeeded in persuading the Association of American Law Schools to issue recommended guidelines for hiring, but most federal judges did not abide by them. In March 1983, the Judicial Conference requested that judges not consider applications before September 15 of the students' third year of law school; by the 1984 season, however, early hiring was rampant. Following a survey of judges' reactions to the September 15 benchmark, the Judicial Conference abandoned the experiment.

In 1986, Stephen G. Breyer, then a circuit judge on the U.S. Court of Appeals for the First Circuit, attempted to build a consensus for the 1986 season by urging federal appellate judges not to consider student applications before April 1. n5 A large number of judges responded favorably, both in writing and in actual practice. In 1987 and especially in 1988, however, the April 1 date was largely ignored; many of the judges interviewed and hired in March, and a few in February, of the students' second year.

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n5 See, e.g., Letter from Judge Breyer to Judge Becker 1 (Jan. 24, 1986) (on file with Judge Becker).